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NAVAL POSTGRADUATE SCHOOL

MONTEREY, CALIFORNIA

THESIS

CIVIL-MILITARY RELATIONS AND SEXUAL ASSAULT

by

Brandi K. Bluhm

September 2016

Thesis Advisor: Carolyn Halladay
Co-Advisor: Cristina Matei

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The Bureau of Justice Statistics' Criminal Victimization Survey reported that there were 284,350 rapes or sexual assaults in the United States in 2014. In the same year, the Department of Defense (DOD) Sexual Assault Prevention and Response Office (SAPRO) estimated that 18,900 sexual assaults occurred in the military. In recent years, Congress has been increasing pressure on the military to improve sexual assault prevention and response; some efforts to resolve the sexual assault problem in the military have included proposals to alter the military justice system to resemble its civilian counterpart. Yet, as the numbers suggest, the civilian justice system may not be doing such a good job either.

Civil-military relations revolve around who controls what. This thesis addresses the role of civil-military relations in regard to sexual assault prevention and response. Through official statistics, documents from the state of California and the Department of Defense, scholarly research, and reports from the media, this paper describes the experience of the victim as he or she navigates through either system. The comparison of the systems side by side reveals that, if the civilian and military communities work together to capitalize on learning from each other, real progress can occur in serving victims of sexual assault in both systems. The power struggle in civil-military relations, over who controls what, tends to distract from the root issue of serving victims of sexual assault. The focus must shift from "Who is doing a worse job?" to "How can both systems learn from the other to improve and best serve the victims of these horrible crimes?"

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CIVIL-MILITARY RELATIONS AND SEXUAL ASSAULT

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Submitted in partial fulfillment of the
requirements for the degree of

MASTER OF ARTS IN SECURITY STUDIES

from the

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ABSTRACT

The Bureau of Justice Statistics' Criminal Victimization Survey reported that there were 284,350 rapes or sexual assaults in the United States in 2014. In the same year, the Department of Defense (DOD) Sexual Assault Prevention and Response Office (SAPRO) estimated that 18,900 sexual assaults occurred in the military. In recent years, Congress has been increasing pressure on the military to improve sexual assault prevention and response; some efforts to resolve the sexual assault problem in the military have included proposals to alter the military justice system to resemble its civilian counterpart. Yet, as the numbers suggest, the civilian justice system may not be doing such a good job either.

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LIST OF ACRONYMS AND ABBREVIATIONS

CO	Commanding Officer
DA	District Attorney
DOD	Department of Defense
FBI	Federal Bureau of Investigation
FY	Fiscal Year
HRRT	High Risk Response Team
MCIO	Military Criminal Investigation Organization
MCM	Manual Courts-Martial
NAESV	National Alliance to End Sexual Violence
NDAA	National Defense Authorization Act
PC	Penal Code
POST	Peace Officer Standards Training
SAFE	Sexual Assault Forensic Exam(iner)
SANE	Sexual Assault Forensic Nurse
SAPR	Sexual Assault Prevention and Response
SARC	Sexual Assault Prevention and Response Coordinator
SAPRO	Sexual Assault Prevention and Response Office
SART	Sexual Assault Response Team
UCMJ	Uniform Code of Military Justice
VA	Victim's Advocate

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I. INTRODUCTION

In 2014, the Bureau of Justice Statistics' Criminal Victimization survey reported that 284,350 rapes or sexual assaults occurred in the United States.[1] In the same year, the Department of Defense (DOD) Sexual Assault Prevention and Response Office (SAPRO) estimated that 18,900 sexual assaults occurred in the military.[2] The Federal Bureau of Investigation's (FBI) Uniform Crime Report for 2014 revealed that despite the U.S. Department of Justice's estimate that just fewer than 300,000 sexual assaults occurred, there were only 84,000 reports of rape in the United States and only 21,007 subsequent arrests.[3] Similarly, out of the 18,900 estimated assaults that occurred with in the military, only 6,131 assaults were reported. Of those reports, 3,648 subjects were identified for investigation, DOD considered action against 2,625 subjects out of that number, and there was enough evidence for disciplinary action against 1,997 of those subjects.[4]

Clearly, both civilian society and the military have a sexual assault problem. In recent years, Congress has been increasing pressure on the military to improve sexual assault prevention and response; some efforts to resolve the sexual assault problem in the military have included proposals to alter the military justice system to resemble its civilian counterpart. Yet, as the numbers discussed earlier suggest, the civilian justice system may not be doing such a stellar job either.

A. MAJOR RESEARCH QUESTION

This thesis evaluates how the military and civilian justice systems serve victims of sexual assault. The analysis reviews the experience of the victim as he or she progresses through each system, from the moment of the assault until after the trial. How are the

---

[1] Jennifer L. Truman and Lynn Langton, *Criminal Victimization, 2014*, (NCJ 248973) (Washington, DC: Bureau of Justice Statistics, 2015), 2, http://www.bjs.gov/content/pub/pdf/cv14.pdf.

[2] "Department of Defense Annual Report on Sexual Assault in the Military, Fiscal Year 2014," Department of Defense, April 29, 2015, 8, http://www.sapr.mil/public/docs/reports/FY14_Annual/DOD_FY14_Annual_Report_on_Sexual_Assault_in_the_Military.pdf.

[3] "2014 Crime in the United States," Federal Bureau of Investigation, last modified 2014, https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-1.

[4] "Department of Defense Annual Report on Sexual Assault in the Military, Fiscal Year 2014," 23.

rights of the victim protected during and after the process? How are victims perceived in each system? What does each system think that it owes victims? The thesis addresses all of these questions and more.

B. SIGNIFICANCE OF THE RESEARCH QUESTIONS

DOD policy on sexual assault prevention and response emerged a short 11 years ago in 2005—a result of the National Defense Authorization Act (NDAA) for fiscal year 2005. Just a year later, in 2006, an estimated 34,200 active-duty military experienced unwanted sexual contact.[5]

Congress has alleged that the DOD has not been doing enough to protect victims of sexual assault. On June 4, 2013, chiefs from the Armed Services sat before a hearing with the Armed Services Committee. The hearing revealed that, while military leadership agreed there should be harsher punishments for perpetrators of sexual assault and more support should be available to victims, the chiefs did not support the proposal to remove commanders' legal power in sexual assault cases.[6] One of the chiefs stated that the action would "adversely impact discipline" and that "we cannot, however, simply 'prosecute' our way out of this problem. At its heart, sexual assault is a discipline issue that requires a culture change."[7] Military victims of sexual assault have experienced retaliation for reporting crimes committed against them.[8] Civilian victims are likely to receive better services if they fit a specific mold (a virtuous female who is attacked by stranger).[9]

The problem is the perception—bolstered by more than one documented case—that commanders will protect a service member from serious penalties, even in the face of

---

[5] "Department of Defense Annual Report on Sexual Assault in the Military, Fiscal Year 2012," Department of Defense, May 3, 2013, 13, http://www.sapr.mil/public/docs/reports/FY12_DOD_SAPRO_Annual_Report_on_Sexual_Assault-volume_one.pdf.

[6] Barbara Salazar Torreon, *Military Sexual Assault: Chronology of Activity in Congress and Related Resources* (CRS Report No, R43168) (Washington, DC: Congressional Research Service, 2013), 11, https://www.fas.org/sgp/crs/natsec/R43168.pdf.

[7] Ibid.

[8] "Comprehensive Resource Center for the Military Justice Improvement Act," Office of Kirstin Gillibrand, accessed August 30, 2016, http://www.gillibrand.senate.gov/mjia.

[9] Rebecca Campbell, "The Community Response to Rape: Victims' Experiences with the Legal, Medical, and Mental Health Systems," *American Journal of Community Psychology* 26, no. 3 (1998): 374, doi: 10.1023/A:1022155003633.

serious charges and good evidence of sexual assault, if the accused is particularly decorated or well liked. Air Force Col. Don Christensen, the chief prosecutor of the U.S. Air Force, has witnessed several instances of commanders protecting perpetrators of sexual assault. The *New York Times* describes his experience:

> Time after time, he witnessed commanders demonstrating their support for the accused by sitting behind him in the courtroom; in one case, after a pilot was found not guilty of rape, the commander leapt from his perch and yelled, "Yeah!" Commanders selected the jury, which sometimes issued sentences far lighter than those meted out in civilian courtrooms. He saw one commander withdraw an airtight rape case days before trial, without explanation.[10]

One of the most infamous examples of a service member being protected from serious penalties was the case of Air Force Lt. Col. James Wilkerson, a star pilot whose conviction was overthrown by Air Force Lt. Gen. Craig A. Franklin with no explanation.[11] Civilian leaders—up to and including members of Congress—believe that ill discipline is a symptom of the root cause of lacking leadership.[12] As such, the civil–military debate concerns which institutions best address the problem of sexual assault in the armed forces.

Representatives on both the military and civilian sides want to solve the problem of sexual assault and to support victims; yet, the military and civilian worlds have distinct cultures and different approaches to problem solving. There is a lot of tension in civil–military relations surrounding who should be in charge of whom, including who takes lead on combatting sexual assault.[13] Amendments to the NDAA have passed, and other bills have been proposed, to alter the military justice system for the perceived benefit of

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[10] Robert Draper, "The Military's Rough Justice on Sexual Assault," *New York Times,* November 26, 2014, http://www.nytimes.com/2014/11/30/magazine/the-militarys-rough-justice-on-sexual-assault.html.

[11] Craig Whitlock, "Air Force General Defends Overturning Sexual Assault Conviction," *Washington Post,* April 10 2013, https://www.washingtonpost.com/world/national-security/air-force-general-defends-overturning-sexual-assault-conviction/2013/04/10/42f8162c-a215-11e2-ac00-8ef7caef5e00_story.html.

[12] Jennifer Steinhauer, "Joint Chiefs' Answers on Sex Crimes Dismay Senators," *New York Times,* June 4, 2013, http://www.nytimes.com/2013/06/05/us/politics/joint-chiefs-testimony-on-sexual-assault-dismays-senators.html.

[13] Peter D. Feaver, "Civil–Military Relations," *Annual Review of Political Science* 2, no. 1 (1999): 215, doi: 10.1146/annurev.polisci.2.1.211.

the victims; these changes were made based on the perception that, if the military justice system is altered to resemble its civilian counterpart, the problem of sexual assault will be one step closer to being resolved.

Though the cultural differences between the military and civilian world have been studied, how that cultural difference affects victims of sexual assault has received rather less systematic attention. Looking at the two systems from the view of a victim is the best way to determine which policy is most effective. Insight from this thesis will contribute to policy decisions that could improve both the civilian and military justice systems.

C. LITERATURE REVIEW

Delving into the systematic distinctions between the civilian and military justice systems requires establishing a general understanding of the interaction between civilians and the military, how sexual assault has been historically defined and how it is defined today, how society defines a victim, and, finally, what sets the military concerns surrounding sexual assault apart from its civilian counterpart.

1. Civil–Military Relations and Civilian Control

Traditional civil–military relations tensions include: civilian fear of the military commandeering the power from the people, the military draining the society of its resources in its attempt defend again adversaries, the military getting involved in conflicts against the will of the citizens, and the matter of obedience to society.[14] This thesis addresses the "who controls what" piece and the matter of obedience to society, as it applies to sexual assault prevention and response.

"Who controls what" has often been discussed through the lens of civilian control. In the *Soldier and that State*, Huntington argued that the concept of civilian control had never been well defined; so, he took it upon himself to offer two types of civilian control: subjective and objective.[15] He writes:

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[14] Ibid., 214–215.

[15] Samuel P. Huntington, *The Soldier and the State: The Theory and Politics of Civil–Military Relations* (Cambridge, MA: Belknap Press of Harvard University Press, 1957), 80.

> Objective civilian control is thus directly opposed to subjective civilian control. Subjective civilian control achieves its end by civilianizing the military, making them the mirror of the state. Objective civilian control achieves its end by militarizing the military, making them a tool of the state. Subjective civilian control exists in a variety of forms, objective control in only one.[16]

Clearly, these are two very different approaches to enforcing civilian control. Huntington was a proponent of objective civilian control—he argued that the best way to control the military was to make the military highly professional. Huntington's theories are the foundation of civil–military relations; however, modern civil–military relation scholars argue that the field has been stunted by its fixation with Huntington.

In *The Routledge Handbook of Civil–Military Relations*, Thomas C. Bruneau urges the field to move beyond Huntington. He writes, "In my view the main problem is that Huntington was proposing a normative theory about civil–military relations, but somehow this normative theory became what Huntington's student, Eliot Cohen, termed the 'normal theory of civil–military relations.'"[17] Bruneau goes on to criticize Huntington for using a tautology approach, putting too much focus on professionalism, and exclusively focusing on control, which over-shadowed other aspects of civil–military relations.[18] Though these criticisms are justified in the broader terms of the U.S. military in society, this thesis does focus on the issue of control regarding the issue of sexual assault; civilian control dictates how the military develops and enforces its sexual assault prevention and response policy.

Ideally, the military is held accountable by the government, which uses certain methods to oversee the military. One way to look at this accountability/oversight relationship is the principal-agent view of civil–military relations. Peter D. Feaver describes this relationship:

> In the civil–military context, the civilian principal contracts with the military agent to develop the ability to use force in the defense of the

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[16] Ibid., 83.

[17] Thomas C. Bruneau and Florina Cristiana Matei, eds, *The Routledge Handbook of Civil–Military Relations* (New York: Routledge, 2015), 14.

[18] Bruneau and Matei, *Handbook of Civil–Military Relations*, 16–17.

> civilian's interests. Once the contract is established, the civilian principal seeks to ensure that the military agent does what civilians want while minimizing the dangers associated with a delegation of power.[19]

The civilian principal ensures that the military agent is held accountable through monitoring mechanisms. Feaver defines monitoring mechanisms as follows:

> Monitoring mechanisms include such activities as audits, investigations, rules of engagement; civilian staffs with expertise and oversight responsibilities; and such extragovernmental institutions as the media and defense think tanks. Essentially, monitoring mechanisms enhance civilian control by bringing military conduct to the attention of responsible civilians.[20]

These mechanisms (SAPR reports, media etc.) are what brought the military's sexual assault problems under heavy scrutiny. Another factor to consider is the civil–military relations gap. Feaver and other civil–military relations scholars have emphasized a "gap" between civilians (including policy makers) and the military, regarding overall approach and experience.[21] The "gap," or lack of understanding, between the two cultures often results in misinterpretations and two distinct approaches to problem solving.

2. What Is Sexual Assault?

At its inception, the United States adopted the common-law system of Great Britain.[22] Rape, as a crime, was characterized by forced penetration of a woman, without her consent, by a man unrelated by marriage.[23] Crimes that would constitute sexual assault today were classified under different categories of sex crimes and included anything from the crime of seduction to rape.[24] If criminal charges were filed, men (the father or the husband of the victim) would press charges against the perpetrator of an

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[19] Peter D. Feaver, *Armed Servants* (Cambridge, MA: Harvard University Press, 2009). Accessed July 24, 2016. ProQuest Ebook Central, 57.

[20] Feaver, "Civil–Military Relations," 229.

[21] Ibid., 230.

[22] Estelle B. Freedman, *Redefining Rape* (Cambridge, MA: Harvard University Press, 2013). Kindle edition.

[23] Ibid.

[24] Ibid.

assault because the perpetrator had damaged his property (the woman, who had little or no legal majority herself).

Though there were a few significant strides forward for women since then, it was not until the feminist movement of the 1960s that the problems of rape and sexual assault were launched into public discussion. One of the main prompts to this debate was the 1975 release of Susan Brownmiller's book *Against Our Will: Men, Women and Rape*. Brownmiller writes, "A female definition of rape can be contained in a single sentence. If a woman chooses not to have intercourse with a specific man and the man chooses to proceed against her will, that is a criminal act of rape."[25]

Her definition is clear and straightforward; yet, society required a more comprehensive definition. Spousal rape exemptions were in place until the 1980s. Yes, until 1980, a husband reserved the right to rape his wife, and, according to a 2000 *California Law Review* article, many states still retain some form of marital rape exemption and only recognize marital rape if the act results in physical harm to the victim; in some states perpetrators of sexual assault receive a lesser punishment if the rape occurs in marriage.[26]

Per the 2012 Directive 6495.01, the DOD defines sexual assault as

> Intentional sexual contact, characterized by use of force, threats, intimidation, abuse of authority, or when the victim does not or cannot consent. The term includes a broad category of sexual offenses consisting of the following specific Uniform Code of Military Justice offenses: rape, sexual assault, aggravated sexual contact, abusive sexual contact, forcible sodomy (forced oral or anal sex), or attempts to commit these acts.[27]

Studies on the effects of sexual assault have revealed that victims of sexual assault experience such symptoms as: increased physical health difficulties, posttraumatic

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[25] Susan Brownmiller, *Against Our Will: Men, Women and Rape* (New York: Open Road Media, 1975), Kindle edition, chap. 2.

[26] Jill Elaine Hasday, "Contest and Consent: A Legal History of Marital Rape," *California Law Review* 88, no. 5 (2000): 1484–1485, doi: 10.15779/Z387Q79.

[27] Deputy Secretary of Defense, *Sexual Assault Prevention and Response (SAPR) Program,* DOD Directive 6495.01, Washington, DC: Deputy Secretary of Defense, 2012, 21.

stress, an increased likelihood of drug and alcohol abuse, and, in some cases, eating disorders.[28]

Additionally, sexual assault negatively affects organizations. At even the lowest levels, Schneider, Swan, and Fitzgerald found that sexual harassment creates "a negative environment and can effect psychological well-being and, particularly, job attitudes and work behaviors."[29] The environment described often results in employees calling in absent to work more, relationships with coworkers falling apart, and decreased job satisfaction.[30] At the very least, employees operating under these circumstances are bound to be less productive, which will ultimately have an adverse effect on the organization.

3. Victimology

People—including victims—have varying ideas of what qualifies as sexual assault. Arnold Kahn and Jennifer Jackson et al., found that women were less likely to label an assault as rape if they were heavily intoxicated and could not resist, or if the assault involved a boyfriend.[31] In "Constructing Rape: Feminism, Change, and Women's Everyday Understandings of Sexual Assault," Amy L. Chasteen explored how a "diverse sample of women" define rape. Chasteen found that there were significant variations in

[28] Cheryl S. Hankin et al., "Prevalence of Depressive and Alcohol Abuse Symptoms among Women VA Outpatients Who Report Experiencing Sexual Assault While in the Military," *Journal of Traumatic Stress* 12, no. 4 (1999), doi: 10.1023/A:1024760900213; Erin M. Eadie, Marsha G. Runtz, and Julie Spencer-Rodgers, "Posttraumatic Stress Symptoms as a Mediator between Sexual Assault and Adverse Health Outcomes in Undergraduate Women," *Journal of Traumatic Stress* 21, no. 6 (2008), doi: 10.1002/jts.20369;; Murray B. Stein et al., "Relationship of Sexual Assault History to Somatic Symptoms and Health Anxiety in Women," *General Hospital Psychiatry* 26, no. 3 (2004): 182, doi: 10.1016/j.genhosppsych.2003.11.003.

[29] Kimberly T. Schneider, Suzanne Swan, and Louise F. Fitzgerald, "Job-related and Psychological Effects of Sexual Harassment in the Workplace: Empirical Evidence from Two Organizations," *Journal of Applied Psychology* 82, no. 3 (1997): 412, doi: 10.1037/0021-9010.82.3.401.

[30] Ibid., 401.

[31] Arnold S. Kahn et al., "Calling It Rape: Differences in Experiences of Women Who Do or Do Not Label Their Sexual Assault as Rape," *Psychology of Women Quarterly* 27, no. 3 (2003): 241, doi: 10.1111/1471-6402.00103.

how women defined rape, which suggested that further investigation must be conducted on how society defines sexual assault.[32]

Estelle Freedman's 2013 book, *Redefining Rape,* shows how, roughly 40 years after Susan Brownmiller's book launched rape into public discussion, society is still struggling to define rape. She writes, "The history of repeated struggles over the meaning of sexual violence reveals that the way we understand rape helps determine who is entitled to sexual and political sovereignty and who may exercise fully the rights of American citizenship."[33] Rape myths, sexual history, socio-economic status, and ethnicity all have an impact on victims and reflect the American culture around rape. For example, Heather D. Flowe and Ebbe B. Ebbeson found that rape claims have been historically treated with skepticism and that, in many states, juries were warned that women tend to make false claims of rape.[34] Also, past sexual behavior of the victims could be paraded before the court to undermine the credibility of the victim.[35]

Rape shield laws show how American culture around rape affects rape survivors. Rape shield laws keep victims' past sexual behavior from being used against them during a trial.[36] Patrick Hines writes about how pre-rape shield courts treated victims in his 2011 *Notre Dame Law Review* note, "First, pre-rape shield courts admitted evidence of sexual history to impeach a witness's credibility on the theory that a witness with 'bad moral character' will be less truthful than one with 'good moral character.' Second, courts considered evidence of sexual history to be probative on issues of consent."[37] People associated promiscuity with consent, which meant that juries were likely to believe that a victim with a colorful sex life would be more likely to consent to sex. Hines also sheds

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[32] Amy L. Chasteen, "Constructing Rape: Feminism, Change, and Women's Everyday Understandings of Sexual Assault," *Sociological Spectrum,* 21, no. 2 (April 2001), 102, doi: 10.1080/02732170121403.

[33] Freedman, "Introduction," in *Redefining Rape*.

[34] Heather D. Flowe, Ebbe B. Ebbesen, and Anila Putcha-Bhagavatula, "Rape Shield Laws and Sexual Behavior Evidence: Effects of Consent Level and Women's Sexual History on Rape Allegations," *Law and Human Behavior* 31, no. 2 (April 2007): 160, doi: 10.1007/s10979-006-9050-z.

[35] Ibid.

[36] "Factsheet: The Violence against Women Act," White House, accessed August 30, 2016, https://www.whitehouse.gov/sites/default/files/docs/vawa_factsheet.pdf.

[37] Patrick Hines, "Bracing the Armor: Extending Rape Shield Protections to Civil Proceedings," *Notre Dame Law Review* 86, no. 2 (March 2011): 2, doi: 10.2139/ssrn.1823592.

light on the societal idea of a "perfect rape victim"—a good, cautious, woman who is suddenly attacked by a stranger.[38]

Similarly, a 1998 study by Rebecca Campbell found that rape victims were most likely to receive good services (a well-coordinated legal, medical, and mental health response) when their experience fit a certain mold (the rapist was a stranger, who used a weapon and injured the victim, and the victim lived in a community where there were more resources for victims).[39]Additionally, victims that were "visibly distressed and receptive to help" were perceived as "good victims" and were likely to receive more help than victims that did not exhibit those behaviors.[40] Estelle Freedman also highlights the idea of a "good victim" when she addresses how the two extreme ideas of a woman (seductress and honorable woman) were incorporated into the legal and cultural concept of rape, which ultimately meant that in order for a rape claim to stick, the victim needed an honorable reputation.[41]

In contrast, a later study from 2009 by Rebecca Campbell et al. showed that there appeared to be shifts in cases being prosecuted; intimate partner rapes were prosecuted etc.[42] Though there is evidence of progress in recent years, rape culture and muddled definitions of what constitutes rape and sexual assault keep sexual assault prevention and response a complicated and difficult task.

4. Military Culture and Sexual Assault

The Fiscal Year 2010 Sexual Assault Prevention and Response (SAPR) Annual report stated of sexual assault: "Sexual assault is a crime that is incompatible with service in the U.S. Armed Forces. It undermines core values, degrades military readiness,

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[38] Patrick Hines, "Bracing the Armor," 2.

[39] Campbell, "The Community Response to Rape," 374.

[40] Ibid., 361.

[41] Freedman, "Introduction," in *Redefining Rape*.

[42] Rebecca Campbell, Debra Patterson, Deborah Bybee, and Emily R. Dworkin, "Predicting Sexual Assault Prosecution Outcomes: The Role of Medical Forensic Evidence Collected by Sexual Assault Nurse Examiners," *Criminal Justice and Behavior* 36, no. 7 (July 2009): 722, doi: 10.1177/0093854809335054.

subverts goodwill, and forever changes the lives of victims and their families."[43] A separate report from the Government Accountability Office expressed a similar sentiment: "Sexual assault is a crime that devastates victims and has a far-reaching negative impact for DOD because it undermines DOD's core values, degrades mission readiness, and raises financial costs."[44] Both statements on sexual assault emphasize that sexual assault is contrary to the core values of the military. Additionally, amid the military's distinctive culture that separates it from its civilian conventions, sexual assault has a unique impact on military organizations.

In "Defining Military Culture," Peter Wilson writes, "All institutions depend on the interaction of their members who are guided by informal customs and procedures, as well as explicit written norms."[45] Within military culture, the factors that dictate the informal customs, procedures, and written norms of members of the armed services are: masculinity and professionalism.

a. Masculinity

The military is steeped in masculinity. Women have maintained roles in the military dating back to the origin of the U.S. military in the 1700s; however, women were not allowed to enlist until 1917, and it was not until 1975 that women entered the U.S. military academies.[46] Today, the ratio of male to female service members is 5:6, which makes for a culture that is both male-dominated and masculine-oriented.[47]

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[43] "Department of Defense Annual Report on Sexual Assault in the Military, Fiscal Year 2010," Department of Defense, March 2011, 1, http://www.sapr.mil/public/docs/reports/DOD_Fiscal_Year_2010_Annual_Report_on_Sexual_Assault_in_the_Military.pdf.

[44] Government Accountability Office, *Actions Needed to Improve DOD's Prevention Strategy and to Help Ensure It Is Effectively Implemented* (GAO-16-61) (Washington, DC: U.S. Government Accountability Office, 2015), 2, http://gao.gov/products/GAO-16-61.

[45] Peter H. Wilson, "Defining Military Culture," *Journal of Military History* 72, no. 1 (2007): 15, doi: 10.1353/jmh.2008.0041.

[46] "National Women's History Month," Department of Defense, accessed August 30, 2016, http://archive.defense.gov/home/features/2015/0315_womens-history/.

[47] Department of Defense, *2014 Demographics Profile of the Military Community*, (Washington, DC: Office of the Deputy Assistant Secretary of Defense [Military Community and Family Policy], 2014), iii, http://docplayer.net/19835829-2014-demographics-profile-of-the-military-community.html.

In *Gender and the Military: Women in the Armed Forces of Western Democracies,* Helena Carreiras describes the military as an "extreme case of a gendered organization."[48] Citing Britton, she describes a gendered organization as "defined, conceptualized and structured in terms of distinction between masculinity and femininity," or as an organization that is "male or female dominated."[49] She then expands on the definition by stating that a gendered organization has "structural divisions along gender lines," an "organizational culture and ideology" that reflects "cultural values about masculinity and femininity," and "the construction of symbols and images that explain, express, reinforce, or sometimes oppose gender divisions."[50] Reflections of this gendered culture in the military include that women are limited by what jobs they can have in the military, that women are out-numbered, etc.[51]

Carreiras describes the military as a "proving ground for masculinity."[52] The definition of masculinity here is narrow. Citing Dobrofski, the author writes that the military determines masculinity through a "healthy body, not a health mind."[53] In sum, Carreiras describes the military definition of masculinity as follows:

> Additionally, the capacity to carry out aggression is seen as being connected to the nature of the male bond, and this, in turn, is sustained by the language of male sexual identity: "the soldier's world is characterized by a stereotypical masculinity. His language is profane; his professed sexuality rude and direct; his maleness is his armor, the measure of his competence, capability, and confidence in himself." Alongside language, proclamation of sexual prowess, riddles and songs that denigrate women, and pornographic posters and movies are also evident symbols of the archetypal culture of masculinity within military units. In one way or another, the soldier's sexual status is always on the line.[54]

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[48] Helena Carreiras, *Gender and the Military: Women in the Armed Forces of Western Democracies,* (New York, NY: Routledge, 2006), Kindle edition.

[49] Ibid.

[50] Ibid.

[51] Ibid.

[52] Ibid.

[53] Ibid.

[54] Helena Carreiras, *Gender and the Military.*

This hyper-masculine nature of military culture immediately creates outsiders; most notably, females and homosexuals.[55] Karen Dunivin observes, "Separatist attitudes (i.e., 'they'ism) along with hostile interactions (e.g., sexual harassment or gay bashing) often emerge."[56] These attitudes emerge because outsiders challenge the masculine status quo and traditional gender roles.[57] Citing Burke, 2004, Carol O'Brien et al. highlight another example of masculinity culture re-enforcing the idea that women are outsiders: "regular use of insult talk during boot camp, in which drill instructors put down recruits by calling them 'pussies' or 'sissies,' teaching them to equate women and sexual minorities with degradation."[58]

This outsider point also touches on the issue of the unexpected victim (male); there is a false belief that men are too tough to be assaulted because military culture is all about mastering "hostile situations" in conflict.[59] O'Brien et al. write:

> In military settings, physical strength is celebrated and rewarded and weakness or passivity is devalued: a strong soldier is a good soldier. Service members are specifically trained in hand-to-hand combat and taught that their weapon is their most valuable possession, reinforcing the idea that to be a successful member of the military, one must be able to protect oneself and others from any intentional aggression at all times.[60]

Cultural beliefs in society, more pronounced in military culture, impose the idea that men should be able to fend off an attacker; these norms make it very hard for male victims, who feel like they should have been able to protect themselves from assault.[61]

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[55] Karen O. Dunivin, "Military Culture: Change and Continuity," *Armed Forces & Society* 20, no. 4 (1994): 536, doi: 10.1177/0095327X9402000403.

[56] Ibid., 537.

[57] Ibid., 536–537.

[58] Carol O'Brien, Jessica Keith, and Lisa Shoemaker, "Don't Tell: Military Culture and Male Rape," *Psychological Services* 12, no. 4 (2015): 359, doi: 10.1037/ser0000049.

[59] Ibid., 359.

[60] O'Brien, Keith, and Shoemaker, "Don't Tell: Military Culture and Male Rape," 359.

[61] Ibid.

O'Brien et al. use the examples of Tailhook '91 and the issue of accepting homosexuals in the military to emphasize the cult of masculinity.[62] Tailhook '91 was an incident where several Navy officers sexually assaulted 83 women and seven men at a conference for Navy pilots in Las Vegas.[63] Tailhook was a three-day symposium that roughly 5,000 people attended.[64] According to the Inspector General report after Tailhook '91, 90 victims of indecent assault were identified, 140 officers from the Marine Corps and Navy were referred to the acting secretary of the Navy for action due to incidents of indecent exposure, sexual misconduct and other improprieties, and 50 officers made false statements during the investigation.[65] On top of the 140 officers referred for disciplinary action, then Secretary of the Navy H. Lawrence Garrett III, resigned.[66] One young Navy service member, interviewed after Tailhook, stated that she believed that the combat restrictions on female service members reinforced the idea that women were inferior in military culture.[67]

b. Professionalism

In *The Soldier and the State,* Samuel P. Huntington writes that military professionalism is owed to three related factors: expertise, responsibility, and corporateness.[68] He defines expertise as "specialized knowledge and skills in a significant field of human endeavor."[69] Huntington states that an individual gains this knowledge through broad liberal education and through technical education (for

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[62] O'Brien, Keith, and Shoemaker, "Don't Tell: Military Culture and Male Rape," 537.

[63] Michael Winerip, "Revisting the Military's Tailhook Scandal," *New York Times,* May 13, 2013, http://www.nytimes.com/2013/05/13/booming/revisiting-the-militarys-tailhook-scandal-video.html?_r=0; Eric Schmitt, "Wall of Silence Impedes Inquiry Into a Rowdy Navy Convention," *New York Times,* June 14, 1992, http://www.nytimes.com/1992/06/14/us/wall-of-silence-impedes-inquiry-into-a-rowdy-navy-convention.html?pagewanted=all&src=pm.

[64] "Tailhook '91," PBS Frontline*,* accessed August 30, 2016*,* http://www.pbs.org/wgbh/pages/frontline/shows/navy/tailhook/91.html.

[65] Deputy Inspector General, "Report of Investigation: Tailhook 91- Part 2, Events of the 35th Annual Tailhook Symposium," Memorandum for Secretary of Defense, April 12, 1993, Washington, DC.

[66] "Post Tailhook Punishment," PBS Frontline, accessed September, 1, 2016, http://www.pbs.org/wgbh/pages/frontline/shows/navy/tailhook/disc.html.

[67] Schmitt, "Wall of Silence."

[68] Huntington, *The Soldier and the State,* 8.

[69] Ibid.

developing skills).[70] Service members receive basic training and other specialized trainings to develop these skills.

Responsibility, on the other hand, involves ethics. Huntington writes, "The profession thus becomes a moral unit positing certain values and ideals which guide its members in their dealings with laymen."[71] The military's responsibility culture involves the ideals such as "good order and discipline." The Manual Courts Martial states, "commanders are responsible for good order and discipline in their commands."[72] Don M. Snider describes discipline as essential to the military because a culture of discipline yields order and an enhanced ability to coordinate among members of the armed services.[73] Service members can even be punished for "conduct prejudicial to good order and discipline" (offense of Article 134).[74]

In military culture, discipline dictates that the rank-hierarchy should not be challenged or questioned; for example, R. M. Haijar found that in red-team exercises (an exercise where a group from within the organization plays the role of a devil's advocate to test or exercise procedures), "red teams encounter cultural resistance and obstacles in the U.S. military partly because of the organization's long-standing and well-entrenched cultural assumptions and orientations linked to not questioning orders, plans, and ideas, especially thoughts from higher ranking members."[75] Good order and discipline is a significant aspect of responsibility and the values of the military.

The last distinguishing feature of military professionalism is corporateness. Corporateness is "a sense of organic unity and consciousness of themselves as a group

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[70] Huntington, *The Soldier and the State,* 9.

[71] Ibid., 9.

[72] Department of Defense, *Manual for Courts-Martial United States* (Washington, DC: United States Army Publishing Directorate, 2012), https://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf.

[73] Don M. Snider, "The Future of American Military Culture: An Uninformed Debate on Military Culture," *Orbis* 43, no.1 (1999): 15, doi:10.1016/S0030-4387(99)80054-4.

[74] Department of Defense, *Manual for Courts-Martial.*

[75] R. M. Hajjar, "Emergent Postmodern U.S. Military Culture," *Armed Forces & Society* 40, no. 1 (2013): 131, doi: 10.1177/0095327X12465261.

apart from laymen."[76] Corporateness is manifested through the concept of unit cohesion. Unit cohesion is arguably the most distinct characteristic that sets military culture apart from its civilian counterpart and is defined as "the perception of support and encouragement from leaders, peers and the military in general."[77] The individual's identity becomes enmeshed with the group to which he or she belongs. The cultural indoctrination of unit cohesion in the military begins in basic training.[78] Researchers have found that strong unit cohesion can alleviate psychological stress; it is the strong bond that allows members of the armed forces to function in high stress environments, and is considered crucial for mission readiness.[79]

Yet, there is another side to unit cohesion. Helena Carreiras sheds light on the difference between social cohesion and task cohesion.[80] She defines task cohesion as the "shared collective commitment to achieve goals" and social cohesion as "emotional personal bonds that unite people, such as friendship, caring, or closeness" which is the type of cohesion that was described earlier.[81] Carreiras states that when these two types of cohesion are not in alignment that they become detrimental to the unit and the mission. She writes, "Group cohesion can be dysfunctional to organizational performance whenever the group goals are contrary to those of the organization, or when the group develops a subculture that make acts of resistance feasible."[82]

Masculinity and professionalism define military culture. Military masculinity is a narrow form of masculinity, characterized by male physical prowess and aggression; this

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[76] Huntington, *The Soldier and the State,* 10.

[77] Allison A. Whitesell, and Gina P. Owens, "The Impact of Patriotism, Morale, and Unit Cohesion on Mental Health in Veterans of Iraq and Afghanistan," *Traumatology* 18, no. 1 (2012): 1, doi: 10.1177/1534765610395625.

[78] Jason Williams, et al. "Unit Cohesion, Resilience, and Mental Health of Soldiers in Basic Combat Training," *Military Psychology,* 28, no. 4, (July 2016): 2, doi: 10.1037/mil0000120.

[79] Ibid.

[80] Helena Carreiras, *Gender and the Military: Women in the Armed Forces of Western Democracies,* (New York, NY: Routledge, 2006), Kindle edition.

[81] Ibid.

[82] Ibid.

version of hyper-masculinity results in a highly gendered military organization.[83] Professionalism is expressed through expertise, responsibility, and corporateness– reflected in education (basic training, etc.), good order and discipline, and unit cohesion.[84]

D. POTENTIAL EXPLANATIONS AND HYPOTHESES

Neither the civilian, nor the military, justice systems are perfect. In both systems, the majority of perpetrators of sexual assault rarely serve time in confinement.[85] In the civilian justice system, the district attorney or prosecutor's office may not take a case to trial. Often, even if a case goes to trial, sexual assault cases are settled through a plea deal. Perceptions of what a "good victim" is often keep victims from getting the appropriate service and/or perpetrators from being convicted. The processing of rape kits in the United States is backlogged and, in some cases, it can take a year or even two years to finally get DNA tested.[86] Finding the State of California Attorney General's information on the prosecution rate, conviction rate, and sentences for rape proved to be very difficult.

While there have been valid concerns regarding the hyper-masculine and corporate nature of the military, one could argue that military culture also revolves around good order and discipline, which encourages behaving at a high moral standard (professional responsibility) that is at odds with sexual assault.[87] If a case is handled correctly within the armed forces, action can be taken immediately through the chain of command to punish a perpetrator of sexual assault. Although hierarchy and unit cohesion have been a concern, the military justice system allows military leaders to take immediate

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[83] Helena Carreiras, *Gender and the Military: Women in the Armed Forces of Western Democracies,* (New York, NY: Routledge, 2006), Kindle edition.

[84] Huntington, *The Soldier and the State,* 8–10.

[85] "The Criminal Justice System: Statistics," Rape Abuse & Incest National Network, accessed August 30, 2016, https://rainn.org/get-information/statistics/reporting-rates.

[86] "Untested Evidence in Sexual Assault Cases," National Institute of Justice, last modified March 18, 2016, http://www.nij.gov/topics/law-enforcement/investigations/sexual-assault/Pages/untested-sexual-assault.aspx#overview.

[87] "Comprehensive Resource Center for the Military Justice Improvement Act," Office of Kirstin Gillibrand.

action against a perpetrator of sexual assault through the additional options of administrative action and/or nonjudicial punishment, which is not the case in the civilian world.[88] The military also provides detailed annual reports to Congress on reports of sexual assault, numbers of suspects identified, whether or not suspects went to trial, and how suspects were sentenced.

Increased attention from Congress on the issue of sexual assault within the armed forces suggests that sexual assault is a military problem—which may not be the case. Civil–military relations tension revolves around defining who is the boss of whom. The source of contention between civilians and the armed forces regarding sexual assault revolves around misperceptions between civilian and military ideas regarding the nature and context of sexual assault, as well as the approach to response and prevention of sexual assault.[89] This thesis explores whether or not "military culture" should be considered an alibi or a real factor in how sexual assault should be thought of and dealt with.

E. RESEARCH DESIGN

This thesis is a comparative analysis of civilian and military justice systems and how they serve victims of sexual assault. I look at three different aspects: (1) how the civilian justice system serves victims of sexual assault; (2) how the military justice system serves victims of sexual assault; and (3) an evaluative analysis of each system, to include criticisms and shortcomings of each system.

For the first aspect, the thesis describes the civilian justice system in the State of California through the eyes of a victim. The view includes the resources and rights available to victim, as well as the process the victim goes through from the moment the assault occurs until after the trial; this requires documentation from the California Attorney General, California Penal Code, State Of California Training Guides for Sexual Assault Response Teams etc. In the second aspect, I apply the same the approach to the

[88] Charles D. Stimson, *Sexual Assault in the Military: Understanding the Problem and How to Fix It* (No. 149) (Washington, DC: Heritage Foundation, 2013), vi, http://www.heritage.org/research/reports/2013/11/sexual-assault-in-the-military-understanding-the-problem-and-how-to-fix-it.

[89] Jennifer Steinhauer, "Joint Chiefs' Answers."

military justice system using information from the Department of Defense Sexual Assault Prevention Office, Department of Defense Instructions, the Manual Courts-Martial (MCM), etc. Additionally, I gathered statistics on trial proceedings and punishments for perpetrators of sexual assault through reports from the Federal Bureau of Investigation, the United States Department of Justice and annual SAPR Reports.

For the third aspect, I researched scholarly articles, media articles, and senate hearings, which provide insight on criticisms and shortcomings of each system. Using the information from the first two chapters and the drawing from the criticisms and shortcomings of each system, I provide an evaluative analysis of each system and suggest what each system might learn from the other in order to improve how each system serves victims of sexual assault.

F. THESIS OVERVIEW AND DRAFT CHAPTER OUTLINE

This thesis is organized in four chapters. The introduction chapter introduces the sexual assault problem in civilian society and the armed forces. The following chapter addresses the civilian justice system and the process that the victim navigates from the moment that an assault occurs, to after the trial. The third chapter does the same, but with the military justice system. The fourth chapter evaluates and provides a comparative analysis of the two systems.

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II. CIVILIAN SYSTEM—STATE OF CALIFORNIA

In my hometown of Monterey, the first California Constitution was drafted in the fall of 1849.[90] Article VI of this Constitution established the state's justice system.[91] Over the last 167 years, California has developed the largest court system in the United States, serving 38 million people.[92]

California has been relatively progressive regarding both women's rights and sexual assault. In 1911, women were given the right to vote—nine years ahead of the federal ruling allowing women to vote.[93] The age of consent in California was moved to sixteen from fourteen in 1897, and California courts took the crime of statutory rape very seriously.[94] Despite the usual skepticism of women who made rape accusations, the California courts were generally steadfast in their decisions—if the woman was under the age of consent, it was rape.[95] The first rape shield laws were introduced in California in 1974—twenty years before the federal rape shield law was introduced in 1994.[96] In early 2016, Governor Jerry Brown introduced the first law of its kind in the United States—requiring that public high schools have a curriculum that teaches "yes means yes" consent. The law dictates that consent shall be defined as a person giving an affirmative "yes," which leaves less room for interpretation—and misunderstandings that may be tantamount to sexual assault.[97]

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[90] "History," California Supreme Court Historical Society, accessed August 30, 2016, http://www.cschs.org/history/.

[91] Ibid.

[92] "About California Courts," California Courts: The Judicial Branch of California, accessed August 30, 2016, http://www.courts.ca.gov/2113.htm.

[93] Freedman, "The Narrowing Meaning of Rape," in *Redefining Rape*.

[94] Ibid.

[95] Ibid.

[96] Tasha Hill, "Sexual Abuse in California Prisons: How the California Rape Shield Fails the Most Vulnerable Populations," *UCLA Women's Law Journal* 89 (2014), 2, http://www.lexisnexis.com.libproxy.nps.edu/lnacui2api/api/version1/getDocCui?lni=5F2P-K4D0-00CT-Y0HX&csi=270944,270077,11059,8411&hl=t&hv=t&hnsd=f&hns=t&hgn=t&oc=00240&perma=true.

[97] Kevin de León and Hannah-Beth Jackson, "Why We Made 'Yes Means Yes' California Law," *Washington Post,* October 13, 2015, https://www.washingtonpost.com/news/in-theory/wp/2015/10/13/why-we-made-yes-means-yes-california-law/.

These examples suggest that California is in the forefront of efforts to protect and benefit victims in comparison to the rest of the country. So, what does the California justice system look like to a victim of sexual assault? Victims of sexual assault in California have the option of reaching out to one or more of the following resources to seek support, or to report, after an assault occurs: law enforcement, rape crisis centers, and health care.[98]

A. REPORTING

If a victim chooses to call the police, he or she can expect to be asked the following questions on the phone: name and location, whether or not he or she needs medical assistance, how long the assault occurred (duration), a brief description of rapist (transportation, direction seen traveling, etc.), and if the rapist had a weapon.[99] Victims can request a female investigator, and they have the right to have a friend, relative, or counselor from a rape crisis center with them during the police interview.[100] A police officer is sent to the victim's location and will ask general questions about the attack; the victim has the right to have officers explain why they are asking certain questions.[101] The California Commission on Peace Officer Standards and Training (POST) is in charge of training for law enforcement.[102] California Penal Code (PC) §13516 requires that POST "prepare guidelines establishing standard procedures which may be followed by police agencies in the investigation of sexual assault cases."[103] All officers are required to pass a regular basic course; the course is 644 hours total, four of which are dedicated to sex crimes.[104] There are four learning needs for the sex crimes learning domain: elements

98 "Women's Rights Handbook," California Department of Justice, accessed August 30, 2016, https://oag.ca.gov/publications/womansrights.

99 Ibid.

100 Ibid.

101 Ibid.

102 California Commission on Peace Officer Standards Training, "Home Page," accessed September 1, 2016, https://post.ca.gov/home.aspx.

103 *Field Services and Standards for Recruitment and Training*, 4 CA Penal Code § 13516 (1967).

104 "Regular Basic Course Training Specifications," California Commission on Peace Officer Standards Training, accessed September 1, 2016, https://post.ca.gov/regular-basic-course-training-specifications.aspx.

required to arrest for sex crimes, the manner in which the peace officer interacts with the victim, complexity of investigative procedures ("setting a positive tone fore the victim interview," "selecting questions for the victim interview," etc.) and understanding Penal Code 290 (sex offender whereabouts).[105]

California also allocates funding to Rape Crisis Centers, which are established throughout the state.[106] In fiscal year (FY) 2014/2015, the State General Fund and the State Victim/Assistance Funds allocated $3,715,000.00 to the California rape crisis program.[107] In addition, the Victims of Crime Act, Violence Against Women Act and Sexual Assault Service Program allocated $13,267,469.00 to the program, putting the total allocation at $16,982,469.00. There are 84 rape crisis centers in California and in 2013 they served 30,490 people.[108] Many state rape crisis centers receive funding from the Victims of Crime Act, Violence Against Women Act and various grants, but surveys from the National Alliance to End Sexual Violence (NAESV) have shown that rape crisis centers across the country are in need of additional funding support.[109] About half of the centers that NAESV surveyed were forced to use a waiting list for counseling services and over a third lost staffing in 2015.[110]

The centers provide resources to victims about their rights, general information on sexual assault, and information on the justice system. The centers can usually provide victims with an advocate, who can accompany them to medical examinations and police interviews.[111] Rape Crisis Centers can also report the sexual assault to police for a victim

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105 "Training and Testing Specifications for Learning Domain #10 Sex Crimes," California Commission on Peace Officer Standards Training, July 1, 2008, https://post.ca.gov/regular-basic-course-training-specifications.aspx.

106 "About," California Coalition Against Sexual Assault, June 20, 2016, http://www.calcasa.org/about/.

107 "Joint Legislative Budget Committee Report" California Governor's Office of Emergency Services, January 9, 2015, 95, http://www.caloes.ca.gov/GrantsManagementSite/Documents/2015%20JLBC%20Report.pdf.

108 "Sexual Assault Awareness Month Toolkit" California Coalition on Sexual Assault, accessed September 1, 2016, http://www.calcasa.org/wp-content/uploads/2010/12/SAAM-2015-Toolkit.pdf.

109 "Victims of Crime Act (VOCA)," National Alliance to End Sexual Violence, accessed September 1, 2016, http://endsexualviolence.org/legislation/victims-of-crime-act-voca.

110 Ibid.

111 "Women's Rights Handbook," California Department of Justice.

(without naming the victim) if the victim does not want to report—that way police are notified that a perpetrator is in the area even if the victim does not want to initiate an investigation.[112]

B. HEALTH CARE

In some cases, victims do not wish to report the crime committed against them, and they are not required to. Law requires health practitioners in California to report the crime to local law enforcement; however, a formal police report is not filed unless the victim makes the report of the assault.[113] Law enforcement is then alerted to the fact that an assault occurred and that a perpetrator may be in the area. Mandatory reporting requires that health practitioners provide the name of the injured person, their whereabouts, the "character and extent" of their injuries, and the identity of the alleged person who inflicted the injury/abuse.[114] If a health practitioner fails to report, he or she may be charged with a misdemeanor.[115] Law enforcement response to mandated reports varies by jurisdiction.[116] The POST guidelines for Law Enforcement Response for dealing with domestic violence states that the agency should respond, get more information from the health practitioner, and then try to locate the victim for a follow-up investigation.[117]

A SAFE (sexual assault forensic examiner) or a SANE (sexual assault nurse examiner) performs the forensic medical examination. According to the California Clinical Forensic Medical Training Center, "California state law requires counties with populations of 100,000 or more to have trained examiners either on call or on duty, and counties with populations over one million are required to have one team per million

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[112] "Women's Rights Handbook," California Department of Justice.

[113] Ibid.

[114] *Reports of Injuries,* 2 CA Penal Code § 11160-11163.6.

[115] Ibid.

[116] "California's Domestic Violence & Mandatory Reporting Law: Requirements for Health Care Practitioners," Futures Without Violence, 6, accessed September 1, 2016, https://www.futureswithoutviolence.org/userfiles/file/HealthCare/mandatory_calif.pdf.

[117] "Guidelines for Law Enforcement Response to Domestic Violence," California Commission on Peace Officer Standards Training," accessed September 1, 2016, 16, http://lib.post.ca.gov/Publications/domestic-violence-manual_wv.pdf.

population."[118] In order to become a SANE/SAFE in California, one must maintain a "valid and active California license as a Registered Nurse, Nurse Practitioner, or Physician Assistant issued by the California Board of Registered Nursing or the Physician Assistant Committee of the Medical Board of California."[119]

In Monterey County, the requirement to become a SANE is the capacity to demonstrate the "ability to provide the full scope of patient care in the area of sexual assault forensic exams."[120] In 2002, a bill was introduced that eventually became California Penal Code 13823.93; it required that one training center (based in a hospital) must be established to ensure that there is a standard curriculum and that procedure is uniform throughout the state of California for forensic examiners.[121]

The California Medical Training Center was the result of this law and provides training to physicians and nurses on performing sexual assault exams.[122] The center is based out of the UC Davis Children's Hospital, a nationally ranked hospital with "more than 120 board-certified physicians and more than 30 subspecialties."[123]

A forensic sexual assault examination consists of a physical examination, an account of the sexual assault, pictures of the victim's body for evidence, and the completion of several forms.[124] The California SANE/SAFE uses an eight-page form called CalEMA 2–923 to conduct the examination. Victims are discouraged from washing themselves or changing their clothes because doing so might destroy crucial evidence.[125] The victim must provide pertinent history information to the SANE

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[118] "Sexual Assault," California Clinical Forensic Medical Training Center, accessed June 14, 2016, https://www.ccfmtc.org/programs/sexual-assault/.

[119] "Sexual Assault Forensic Examiner-Per Diem," Monterey County, 2, https://www.co.monterey.ca.us/personnel/documents/specifications/52A93.pdf.

[120] Ibid.

[121] *Criminal Justice Planning,* 6 CA Penal Code § 13823.93, (1995).

[122] "California Medical Protocol for Examination of Sexual Assault and Child Sexual abuse Victims," United Nations Entity for Gender Equality and the Empowerment of Women, accessed September 1, 2016, iv, http://www.endvawnow.org/uploads/browser/files/california_medical_protocol_2001.pdf.

[123] "Welcome to UC Davis Children's Hospital," UC Davis Children's Hospital, accessed September 1, 2016, http://www.ucdmc.ucdavis.edu/children/.

[124] "Women's Rights Handbook," California Department of Justice.

[125] "Women's Rights Handbook," California Department of Justice.

(physical injuries, medical procedures, sexual activity within the five days preceding the assault, drug/alcohol use, post-assault hygiene activity if the assault was within 72 hours of the examination etc.).[126] Post-assault hygiene information is only applicable if the assault occurred within 72 hours of the report; this information is important because if the victim changed clothes, showered or bathed etc., crucial evidence may need to be recovered elsewhere (clothes) or may have been washed away (if the victim showered or douched). The SANE also asks for information on the methods that the attacker used including weapons, physical blows, grabbing/holding/pinching, physical restraints, chocking/strangulation, burns (thermal/chemical), threats, and involuntary use of drugs/ alcohol.[127] The victim is then asked about acts perpetrated by the attacker ranging from penetration of the vagina or anus by the penis, finger, and/or an object to non-genital acts such as licking, kissing, or suction injury.[128]

After the questions about the assault, a physical exam follows and the victim's clothing is collected for evidence. Dried and moist secretions, stains, and foreign materials are collected from the victim's body, and his or her entire body is scanned with a Wood's lamp.[129] A Wood's lamp is an ultraviolet light that causes stains to fluoresce. Often the examiner uses the Wood's lamp to detect semen or any other stain they may have missed in normal lighting. The exam also includes a genital examination; for a female victim, the SANE collects pubic hair, takes four swabs form the vaginal pool, two cervical swabs, and two anal swabs.[130] If the victim is male, pubic hair, two penile swabs, two scrotal swabs, and two anal swabs are collected.[131] The examiner places the swabs in appropriate packaging (usually a box or envelope provided in the evidence kit)

[126] "Forensic Medical Report: Acute (<72 Hours) Adult Adolescent Sexual Assault Examination," California Emergency Management Agency, 2, http://harborpeds.org/files/CalEMA_2-923_form.pdf.

[127] Ibid.

[128] Ibid., 3.

[129] Ibid., 4.

[130] Ibid., 6.

[131] Ibid., 7.

and turns them over to law enforcement with the rest of the kit for DNA testing.[132] The SANE also takes photos of the entire body, including genitals.[133] Victims are also usually offered medicine to prevent sexually transmitted diseases and pregnancy.[134]

After the exam is completed, law enforcement gets a copy of the examination medical forms, adds it to the police report, and takes custody of all the evidence (including the kit).[135] According to Penal Code 13823.95, a sexual assault victim will not be charged for a medical examination if the police bring him or her to the medical facility.[136] The forensic medical exam is paid for by the law enforcement agency investigating the crime, but medical treatment is paid for by the victim's insurance.[137] Forensic exams usually cost $1,000.00 or more.[138] Compensation for other medical costs, mental health counseling, and lost wages/support are available to victims through victims' compensation funds.[139]

California's Victim Compensation and Government Claims Board was founded in 1965 and was the first in the United States.[140] Victims can fill out a seven-page form and send it to the Claims Board, which will review the form and related documentation—for

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[132] "California Medical Protocol for Examination of Sexual Assault and Child Sexual abuse Victims," United Nations Entity for Gender Equality and the Empowerment of Women, accessed September 1, 2016, 33–34, http://www.caloes.ca.gov/GrantsManagementSite/Documents/2-923%20to%202-950%20Protocol.pdf.

[133] "Forensic Medical Report: Acute (<72 Hours) Adult Adolescent Sexual Assault Examination," California Emergency Management Agency, 8, http://harborpeds.org/files/CalEMA_2-923_form.pdf.

[134] "Receiving Medical Attention," Rape Abuse & Incest National Network, accessed August 31, 2016, https://rainn.org/get-information/aftermath-of-sexual-assault/receiving-medical-attention.

[135] "Guidelines for Law Enforcement Response to Domestic Violence," California Commission on Peace Officer Standards Training," accessed September 1, 2016, 15–16, http://lib.post.ca.gov/Publications/domestic-violence-manual_wv.pdf.

[136] "Women's Rights Handbook," California Department of Justice.

[137] "Sexual Assault Training Standards: A Trainer's Guide," California Coalition against Sexual Assault, June 14, 2016, 38, http://www.calcasa.org/wp-content/uploads/2011/05/Training-Standards.pdf.

[138] Elizabeth Nolan Brown, "Where Rape Victims Are Forced to Pay for Their Own Forensic Exams," October 9, 2014, https://reason.com/archives/2014/10/09/rape-victims-charged-for-forensic-tests.

[139] "Crime Victim Compensation," Rape Abuse & Incest National Network, last modified 2009, https://rainn.org/public-policy/legal-resources/compensation-for-rape-survivors.

[140] "Member News and Information," National Association of Crime Victim Compensation Boards, accessed June 15, 2016, http://www.nacvcb.org/index.asp?sid=5.

example the crime report—and then determine whether or not the victim is eligible.[141] Usually, the review process takes around 90 days.[142] Victims can be compensated for expenses related to the crime, ranging from mental health services to relocation.[143] The board was born out of the California Board of Control, which started in 1911, and was responsible for "helping Californians who were harmed by any action of the government."[144] Fines against individuals who commit crimes, traffic violation fines, and funds from the Victims of Crime Act pay for the program.[145] In FY 2007–2008 the Victim Compensation Program balance was worth 142.6 million dollars and in FY 2014–2015 it distributed about 51.5 million in compensation.[146] The most that the board has paid to victims was in FY2001–2002 at $125,777,645.00.[147]

C. LEGAL PROCESS

If the victim has reported the case to law enforcement through any of the aforementioned channels, a prosecuting attorney will be assigned to the case and will explain the legal procedures to the victims including how often he or she can expect to be in court and what testimony he or she will provide.[148] If the suspect was arrested, the deputy district attorney decides whether or not to press charges based on how strong the evidence is in the case.[149] He or she has two days after the arrest to make this evaluation and file charges (because the defendant has the right to a speedy trial).[150] As sexual

141 "Applying for Compensation," California Emergency Management Agency, accessed August 30, 2016, http://www.vcgcb.ca.gov/victims/faq/applying.aspx#App.

142 Ibid.

143 Ibid.

144 "Victim Compensation and Government Claims Board," California Emergency Management Agency, 7.

145 Ibid., 8.

146 "California Victims of Crime Government Compensation Board Annual Report Fiscal Year 2014–2015," California Emergency Management Agency, accessed September 1, 2016, 10, http://vcgcb.ca.gov/docs/reports/AnnualReport-FY-14-15.pdf.

147 Ibid., 15.

148 "Women's Rights Handbook," California Department of Justice.

149 Ibid.

150 "How Criminal CasesWork," California Courts: The Judicial Branch of California, accessed August 30, 2016, http://www.courts.ca.gov/1069.htm.

assault is a violent crime, it is considered a crime against the state; therefore, according to the California Women's Rights Handbook, "the decision to prosecute, accept a plea bargain, or drop the case is up to the district attorney, not the victim."[151] According to the Rape, Abuse, and Incest National Network (RAINN), "4/5 of assaults are committed by someone known to the victim."[152]

The statute of limitations for most sexual assault crimes in California is six years; in other words, in order to press charges, charges must be filed within six years of the assault.[153] The Judicial Branch of California defines a statute of limitations as "a deadline for filing a law suit."[154] So, if the victim waits past the six-year mark to report, filing charges for the crime will be considerably more difficult, if not impossible all together. Victims in California who are past the statute of limitations have the option of filing a civil suit, perhaps for battery or false imprisonment.[155] The recent accusations against Bill Cosby have illuminated this issue; many of the women accusing Cosby of assault are past the statute of limitations in their respective states.[156] By July 2015, 46 women came forward publicly and accused Cosby of assaulting them.[157] Some have filed civil suits against Cosby (seven accusers have sued him for defamation).[158]

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151 "Women's Rights Handbook," California Department of Justice.

152 "More Statistics," Rape Abuse & Incest National Network, last modified 2009, https://rainn.org/statistics.

153 "Criminal Statutes of Limitations," Rape Abuse & Incest National Network, last modified 2009, http://apps.rainn.org/policy-crime-definitions/index.cfm?state=California&group=7.

154 "Statute of Limitations," California Courts: The Judicial Branch of California, accessed August 30, 2016, http://www.courts.ca.gov/9618.htm#Type_of_Problem_or_Case.

155 "Civil Justice for Victims of Crime in California," The National Crime Victim Bar Association, accessed September 1,2016, https://victimsofcrime.org/docs/NCVBA/ca-cj-2012.pdf?sfvrsn=2.

156 Don Thompson, "California's Legislature is advancing a bill driven in part by prosecutors' difficulty in pursuing sexual assault charges against Bill Cosby," *U.S. News and World Report,* April 12, 2016, http://www.usnews.com/news/entertainment/articles/2016-04-12/california-weighs-changing-rape-statute-after-cosby-claims.

157 Noreen Malone, "'I'm No Longer Afraid': 35 Women Tell Their Stories About Being Assaulted by Bill Cosby and the Culture that Wouldn't Listen" *New York Magazine*, July 26, 2015, http://nymag.com/thecut/2015/07/bill-cosbys-accusers-speak-out.html.

158 Sydney Ember, "Bill Cosby's Wife Testifies Again in Civil Suit Against Him," *New York Times,* April 19, 2016 http://www.nytimes.com/2016/04/20/arts/bill-cosbys-wife-testifies-again-in-civil-suit-against-him.html?rref=collection%2Ftimestopic%2FCosby%2C%20Bill&action=click&contentCollection=timestopics&region=stream&module=stream_unit&version=latest&contentPlacement=6&pgtype=collection.

If the prosecutor files charges, the next step is arraignment.[159] At the arraignment, the defendant is informed of what he or she is being charged with and of his or her rights.[160] The defendant can then enter a plea of guilty, not guilty, or no contest. "No contest" is similar to a guilty plea, but the conviction should not be used against the defendant if a civil suit occurs.[161] Next, the case may be settled or dismissed but, if neither of those instances occur, a preliminary hearing occurs.[162]

At the preliminary hearing, the judge determines whether or not there is sufficient evidence to prove the case.[163] Should the judge rule that there is sufficient evidence, the cases moves forward to a second arraignment; however, if the judge rules otherwise, all charges are dropped and the suspect is released. On the occasion that the judge believes there is enough evidence for the case to go to trial, the prosecutor files the Information; the filing of "the Information" is what triggers a second arraignment.[164] At the second arraignment, the defendant makes another plea.[165] Before the trial occurs, the defense and prosecution exchange information and each side has the opportunity to file pre-trial motions; these motions can call for dismissing the case or for preventing specific evidence from being used at trial.[166]

The trial may take place months after the sexual assault occurred due the time that passed from the arraignment, to the preliminary hearing to the second arraignment etc.; for example, the Information has to be filed within 15 days of the preliminary hearing and then the trial must begin 60 days after the second arraignment.[167]

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[159] "How Criminal Cases Work," California Courts: The Judicial Branch of California, accessed August 30, 2016, http://www.courts.ca.gov/1069.htm.

[160] Ibid.

[161] Ibid.

[162] Ibid.

[163] "Women's Rights Handbook," California Department of Justice.

[164] "How Criminal Cases Work," California Courts.

[165] Ibid.

[166] "How Criminal Cases Work," California Courts.

[167] "Women's Rights Handbook," California Department of Justice; "How Criminal Cases Work," California Courts.

Defendants have the right to have their case heard by a jury of their peers; so, before the trial, the defendant decides whether to have a jury trial (where a jury determines guilt or innocence) or court trial (where the judge determines guilt or innocence).[168] If the defendant selects a jury trial, potential jurors are questioned by the judge and attorneys involved in the trial for a selection process.[169] The questioning process is known as "voir dire" and occurs in order to make sure that the 12 members of the jury will be fair, objective, and unbiased.[170] According to the California Code of Civil Procedure Section 223, the court can limit the amount of time that counsel has to question the jurors.[171] Local courts determine whether the questions are relevant and/or necessary during voir dire.[172] The California Courts give examples of improper voir dire questions, such as those that might pre-condition the juror to a certain result or comments that involve the personal lives of the parties or their attorneys.[173]

The criminal trial for a sexual assault case will start with an opening statement from the prosecution (representing the state of California) and an opening statement from the defendant's lawyer.[174] Both sides present evidence and there can be testimony from witnesses. Victims have the right to ask permission not to give their personal information (name, address, telephone number) upon testifying.[175] They also have the right to have two people accompany them to court for moral support.[176] The deputy district attorney and the defense attorney question victims who choose to testify.[177] Although attorneys

168 "How Criminal Cases Work," California Courts.

169 "About the Trial Process," California Courts: The Judicial Branch of California, accessed August 30, 2016, http://www.courts.ca.gov/2240.htm#tab2244.

170 Ibid.

171 *Trial Jury Selection and Management Act,* 3 California Code of Civil Procedure § 223 (2011).

172 *Trial Jury Selection and Management Act,* 3 California Code of Civil Procedure § 205 (2011).

173 "2016 California Rules of Court Standard 4.30 Examination of prospective jurors in criminal cases," California Courts: The Judicial Branch of California, accessed September 1, 2016, http://www.courts.ca.gov/cms/rules/index.cfm?title=standards&linkid=standard4_30.

174 "About the Trial Process," California Courts.

175 "Women's Rights Handbook," California Department of Justice.

176 Ibid.

177 Ibid.

cannot ask about the victim's sexual behavior in the past, they are allowed to ask about the victim's sexual past with the defendant.[178]

After all of the evidence and testimony have been presented, the prosecutor and defense attorney deliver their closing arguments to the jury.[179] Following the closing arguments, the judge gives the jury instructions on the law and how it applies to the case at hand.[180] The jury then deliberates to determine a verdict; the jurors must come to a unanimous decision.[181] If the jury fails to reach a unanimous decision, there is a mistrial.[182]

In 2014, the California Attorney General's Office reported that there were 9,397 reports of rape.[183] If, as is commonly reported, one third of victims report sexual assault, then the real number of rapes and sexual assaults in the state in 2014 is more like 28,191.[184] There followed 2,444 felony arrests.[185] Once the report arrives to the felony arrests, the rape statistics are no longer clear and the report only provides statistics for violent crimes in general. The conviction rate for felony arrests was 68.9 percent.[186] There were 315,782 felony dispositions—some 217,688 were convicted and 179,579 were sentenced to probation with jail, state institutions, or just jail.[187] The Attorney General did not provide any statistics in the report about how many of the 2,444 felony arrests for rape in California went on to trial, resulted in conviction, and sentences.

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178 "Women's Rights Handbook," California Department of Justice.

179 "About the Trial Process," California Courts.

180 Ibid.

181 Ibid.

182 Ibid.

183 "Crime in California 2014," California Department of Justice, accessed August 30, 2016, https://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/candd/cd14/cd14.pdf?/.

184 "The Criminal Justice System: Statistics," Rape Abuse & Incest National Network, accessed September 1, 2016, https://www.rainn.org/statistics/criminal-justice-system.

185 "Crime in California," California Department of Justice, 20.

186 Ibid., 49.

187 Ibid.

D. VICTIMS RIGHTS AND RESOURCES

California Victims' Rights are covered under Article 1, Section 28(b) of the California Constitution.[188] The full list of victims' rights is listed in Table 1:

Table 1. Victims Bill of Rights—Marsy's Card—State of California[189]

1. Fairness and Respect
2. Protection from the Defendant
3. Victim Safety Considerations in Setting Bail and Release Conditions
4. The Prevention of the Disclosure of Confidential Information
5. Refusal to be Interviewed by the Defense
6. Conference with the Prosecution and Notice of Pretrial Disposition
7. Notice of and Presence at Public Proceedings
8. Appearance at Court Proceedings and Expression of Views
9. Speedy Trial and Prompt Conclusion of the Case
10. Provision of Information to the Probation Department
11. Receipt of Pre–Sentence Report
12. Information About Conviction, Sentence, Incarceration, Release, and Escape
13. Restitution
14. The Prompt Return of Property
15. Notice of Parole Procedures and Release on Parole
16. Safety of Victim and Public are Factors in Parole Release
17. Information About These 16 Rights

California draws on a variety of resources and institutions to protect these rights, but victims can enforce their rights under Marsy's Law "in any trial or appellate court with jurisdiction over the case as a matter of right."[190] Marsy was a young woman studying at UC Santa Barbara; in 1983, she was killed by her ex-boyfriend.[191] A week after the murder, Marsy's mother was confronted by the accused murderer, now out on bail, in a grocery store. The courts had no obligation to inform Marsy's mother that he

[188] "Marsy's Card and Resources," California Attorney General, accessed August 30, 2016, http://oag.ca.gov/sites/all/files/agweb/pdfs/victimservices/marsy_pocket_en_res.pdf?.

[189] Source: "Marsy's Card and Resources," California Attorney General, accessed August 30, 2016, http://oag.ca.gov/sites/all/files/agweb/pdfs/victimservices/marsy_pocket_en_res.pdf?.

[190] "Frequently Asked Questions," California Attorney General, accessed June 20, 2016, https://oag.ca.gov/victimservices/content/faq.

[191] "Marsy's Story," Marsy's Law, accessed September 1, 2016, http://marsyslaw.us/about-marsys-law/marsys-story/.

had been released. Eventually, Marsy's brother, Henry, went on to campaign for Marsy's Law, which passed in California in 2008.[192] Today, victims can assert their Marsy's rights themselves or through their attorney, law representative, or the prosecutor.[193] According to the Marsy's Law text, once a victim asserts his or her rights, "the court or other authority with jurisdiction shall act promptly on such a request, affording a remedy by due course of law for the violation of any right. The reasons for any decision regarding disposition of a victim's right shall be clearly stated on the record."[194]

The California Attorney General's Office has a Victims' Services Unit, which is available to victims and to their families throughout "every stage of the criminal process."[195] The services that the Victims Services Unit provides range from notifying families about appeals, to assisting victims and their families when the Office of the Attorney General is prosecuting a case; Californians also can call a toll free number with any questions.[196]

The last right is the most important because it is the right that keeps the victims informed of their rights as a victim of sexual assault. California protects this right by requiring that law enforcement provide the victim with a Marsy's Card (list of rights) upon initial contact, at a follow-up investigation, or soon after as determined by the officer.[197]

The right to be treated with fairness and respect is protected through the support of Sexual Assault Response Teams (SART) and Rape Crisis Centers/Victim Assistance Centers. The agencies that make up a SART include, but are not limited to: rape crisis

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[192] "About Dr. Nicholas," Marsy's Law, accessed September 1, 2016, http://marsyslaw.us/about-marsys-law/about-dr-nicholas/.

[193] "Frequently Asked Questions," California Attorney General, accessed June 20, 2016, https://oag.ca.gov/victimservices/content/faq.

[194] "Marsy's Law A Model Constitutional Amendment to Afford Victims Equal Rights," Marsy's Law, accessed September 1, 2016, http://marsyslaw.us/wp-content/uploads/2015/11/Marsy-s-Law-Model-Constitutional-Amendment.pdf.

[195] "Victims' Services Unit," California Department of Justice, accessed August 30, 2016, http://oag.ca.gov/victimservices.

[196] Ibid.

[197] "Frequently Asked Questions," California Attorney General, accessed June 20, 2016, https://oag.ca.gov/victimservices/content/faq.

centers, SANE/SAFEs, and law enforcement organizations.[198] The objective of the SART is for multiple agencies to coordinate together to ensure support for the victim, evidence collection, and prosecution of perpetrators; for example, the California Forensic Medical Training Center provides training to health care practitioners on how to work with law enforcement and vice-versa.[199] The first California SART teams were established in the 1980s in the counties of San Luis Obispo, Santa Cruz, and Sacramento.[200] As of now, many, but not all, counties in California have an established SART.[201] The following counties are still in need of Sexual Assault Response Teams: Amador, Glenn, Kings, Plumas, San Bernardino, San Joaquin, Stanislaus, Tehama, Ventura, and Yolo. In August 2013, the Governor of California approved legislation that allowed for the establishment of an interagency SART program for every county in the state.[202] The bill requires that each team "evaluate the effectiveness of individual agency and interagency protocols and systems by conducting case reviews involving sexual assault."[203] Penal Code Section 13898-13898.2 lays out the terms for establishing these interagency teams, including the agencies that should be included and objectives (evaluations of cost effectiveness, planning and planning/implementing prevention strategies etc.).[204]

Victim Assistance Centers and Rape Crisis Centers both serve victims with fairness and respect by guiding victims through the reporting process and through the criminal justice system.[205] Rape Crisis Centers provide supportive advocates that keep

198 "California SART Report," California Coalition Against Sexual Assault, accessed September 1, 2016, 11, http://www.calcasa.org/wp-content/uploads/2010/01/SART-Report_08.pdf.

199 Ibid., 92.

200 Ibid., 3

201 Ibid., iv.

202 *An act to add to Chapter 12 to Title 6 of Part 4 of the Penal Code, relating to sexual abuse,* Assembly Bill No. 1475 Chapter 210 (2015).

203 Ibid.

204 *The Penal Code of California* § 13898-13898.2.

205 "California SART Report," California Coalition Against Sexual Assault, accessed September 1, 2016, iv, http://www.calcasa.org/wp-content/uploads/2010/01/SART-Report_08.pdf.

victims informed about the resources available to them.[206] All 58 California counties have a victim/witness assistance center.[207] California Penal Code 13897.1 states that there must be an "established a resource center which shall operate a statewide, toll-free information service, consisting of legal and other information, for crime victims and providers of services to crime victims."[208]

The state of California upholds the victim's right to be protected from the defendant through requiring that judges consider the safety of the victim in setting bail and through providing the option of filing a restraining order. In the instance of sexual assault, the victim asks for a civil harassment restraining order.[209] The victim does not have to pay a filing fee because the attacker will have used violence against him or her.[210] To start the restraining order application process, there are about seven forms to fill out (not including any forms required by the local court).[211] After the forms are reviewed, the individual is instructed to make five copies of all the forms.[212] Then, the victim turns the forms in to the clerk at the court—the judge must make a decision by the next day (the decision can include a recommendation that the victim change the forms).[213] If the judge does grant a temporary restraining order, the victim must file the forms, make sure the individual against whom the order is issued is served with the restraining order, and then provide proof that the restraining order was served before the hearing.[214] Once these steps are completed, the victim must go to the hearing and provide evidence to help argue his or her case.[215] If the victim misses the hearing, he or she must

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[206] Ibid.

[207] Ibid., 49.

[208] *Victims' Legal Resource Center,* 5 CA Penal Code § 13897-13897.3.

[209] "Ask for a Restraining Order," California Courts: The Judicial Branch of California, accessed August 30, 2016, http://www.courts.ca.gov/1278.htm.

[210] "Can a Civil Restraining Order Help Me?" (CH-100-INFO), California Courts: The Judicial Branch of California, accessed August 30, 2016, http://www.courts.ca.gov/documents/ch100info.pdf.

[211] Ibid.

[212] Ibid.

[213] Ibid.

[214] Ibid.

[215] Ibid.

start over from the very beginning of the process.[216] While it is notable that the state provides ways that a victim can protect himself or herself, the process seems to be lengthy and burdensome. Restraining orders keep the restrained person away, and order the restrained person to stop certain acts against a person.[217] Restraining orders essentially make it against the law for the restrained person to disobey the order; if the restrained person disobeys the order, the victim must call the police, show them a copy of the order, and gather proof of the violation (i.e., threatening text messages, statements from witnesses).[218] If the restrained person did violate the order, it is a crime and the police can fine the restrained person or arrest them and put them in jail.[219]

The victim's right to have his or her safety considered during bail and release considerations is protected through requiring the judge to consider the seriousness of the crime and the victim's safety when he or she is setting bail or release.[220] Ideally, the legal representative of the victim, or the prosecutor, brings up this right to the judge at the preliminary hearing when he or she is setting bail or release.

Preventing the disclosure of confidential information is effected through Title 18 United States Code Section 1905.[221] The punishments for disclosing confidential information are fines, imprisonment for not more than a year, or both.[222]

The state protects the victim's right to refuse interview by the defense, by law enforcement informing the victim of that right. The rights to conference with the prosecution, have notice of the pre-trial disposition, have notice of and presence at public proceedings, and the right appearance at court proceedings and expression of views are

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[216] Ibid.

[217] "Restraining Orders," California Courts: The Judicial Branch of California, accessed June 15, 2016, http://www.courts.ca.gov/1260.htm.

[218] "Enforce a Restraining Order" California Courts: The Judicial Branch of California, accessed June 15, 2016, http://www.courts.ca.gov/1266.htm.

[219] Ibid.

[220] California Constitution Article I, § 28.

[221] *Disclosure of Confidential Information Generally,* 18 U.S. Code § 1905 (2008).

[222] Ibid.

protected by the Victim Services Unit.[223] These notices are available upon request—the victim must contact the local victim witness assistance center or district attorney's office to request the notifications.[224] Other information that victims can request form the Victim's Service Unit are the right to Information About Conviction, Sentence, Incarceration, Release, and Escape and the right to Notice of Parole Procedures and Release on Parole.[225]

California protects the victim's right to a speedy trial and "prompt conclusion of the case" by requiring deadlines; for example, if the Information is not filed within 15 days, the case may be dismissed.[226] The right to provision of Information to the Probation Department and to Receipt of Pre–Sentence Report is protected through access to the California Department of Corrections and Rehabilitation's Office of Victim and Survivor Rights and Services.[227] They have a website and a toll-free number that victim's can call for information.[228]

A victim's right to restitution is protected through the California Victims Compensation Program.[229] The program defines restitution as "monetary compensation owed to you [the victim] by the offender."[230] The victim must determine his or her expenses and then he or she reaches out to the district attorney's office, or the probation office, to request a restitution hearing.[231] Restitution can cover expenses ranging from funeral expenses to attorney fees.[232] If the restitution is being collected from a state

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223 "Victims Service," California Attorney General, accessed June 20, 2016, https://oag.ca.gov/victimservices.

224 Ibid.

225 Ibid.

226 *Dismissal of the Action for Want of Prosecution or Otherwise,* 10 CA Penal Code § 1382.

227 "Victims Service," California Attorney General, accessed June 20, 2016, https://oag.ca.gov/victimservices.

228 Ibid.

229 "A Victim's Restitution Guide," California Department of Corrections and Rehabilitation, accessed August 30, 2016, http://www.cdcr.ca.gov/victim_services/docs/restitution_guide.pdf.

230 Ibid.

231 Ibid.

232 "A Victim's Restitution Guide,"

prison inmate, a trust account is set up for the inmate and the California Department of Corrections and Rehabilitation collects up to 50 percent of the money deposited into the account to put toward restitution.[233] Prisoners may receive money from family or they may do paid work in prison, making between 38 cents and $1 an hour; however, not all prisoners have work, or such accounts, so restitution money may not be available from this source.[234] If the inmate ends up leaving prison, the Franchise Tax Board takes over handling any unpaid restitution through various methods ranging from wage garnishment to bank liens.[235] In the county of Sacramento, the victim's right to "prompt return of property" is protected through the Evidence and Property Office.[236] After the district attorney releases the evidence, the property must be picked up within 15 days.[237] In addition to these rights, a victim also has the option of filing a civil suit against his or her attacker but he or she must use his or her own funding and resources.[238]

E. CRITICISMS AND SHORTCOMINGS

Societal beliefs about rape have a major impact on the civilian justice system. Beliefs about rape affect: the laws, the ways that juries arrive at verdicts, and the choices that assistant DAs make when they determine to take a case to trial or not. Laws in the United States have historically put additional burdens on the victim; examples of these laws include the requirement that additional evidence corroborate the victim's testimony and a warning in the instructions to the jury about the dangers of the false rape accusations.[239] Only in recent years have laws started to change to protect victims.[240] The

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[233] Ibid.

[234] Ibid.

[235] Ibid.

[236] "Evidence and Property," City of Sacramento, accessed August 30, 2016, https://www.cityofsacramento.org/Police/How-Do-I/Obtain-My-Property-or-Evidence.

[237] Ibid.

[238] "Before You File Your Case," California Courts: The Judicial Branch of California, accessed June 15, 2016, http://www.courts.ca.gov/12414.htm.

[239] David P. Bryden and Sonja Lengnick, "Rape in the Criminal Justice System," *Journal of Criminal Law and Criminology* 87, no 3, (Summer 1997): 1196–1197, http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6934&context=jclc.

[240] Cassia C. Spohn et al., "Prosecutors' Charging Decisions in Sexual Assault Cases: A Multi-Site Study, Final Report," accessed September 1, 2016, https://www.ncjrs.gov/pdffiles1/nij/grants/197048.pdf.

effectiveness of these new laws is still questionable.[241] For example, studies have shown that rape shield laws did not have a major impact on conviction rates, which demonstrates the power of the public's biases about rape.[242]

Jury decisions are also rooted in societal beliefs; for example, juries have been shown to judge acquaintance rape victims more harshly than stranger rape victims.[243] As presented in Chapter I, the definition of a victim is still up in the air for most of America; consequently, the jury decision to convict is up in the air as well. As a result, prosecutors tend to factor these cultural biases about rape into the decision to take a case to trial or not; this is known as screening for "convictability."[244] Ava Orenstein writes:

> Therefore, even prosecutors, who may not personally believe in rape myths, will screen for "convictability," anticipating how the defense will portray the victim and how the jurors will view her. This process of winnowing "weak" cases out of the system enforces gender stereotypes and perpetuates the status quo.[245]

Why would prosecutors do this? Prosecutors often focus on conviction rates to measure their success.[246] The incentive to a prosecutor is to secure cases that they can win. In 2002, the National Criminal Justice Reference Service produced a report that studied prosecution decisions in three urban areas (Kansas City, MO, Philadelphia, PA, and Miami, FL).[247] The study found that " over half of the sexual battery cases were not

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[241] Ronet Bachman and Raymond Paternoster, "A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come," *Journal of Criminal Law and Criminology* 84, no 4, (Fall 1993), http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6785&context=jclc.

[242] Bryden and Lengnick, "Rape in the Criminal Justice System," 1264.

[243] Ibid., 1265.

[244] Tyler Kingkade, "Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases," *Huffington Post,* June18, 2014, http://www.huffingtonpost.com/2014/06/17/college-rape-prosecutors-press-charges_n_5500432.html.

[245] Aviva Orenstein, "Special Issues Raised by Rape Trial," *Fordham Law Review* 76, no 3, (2007):, 1590, http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4333&context=flr.

[246] Stephanos Bibas, "Rewarding Prosecutors for Performance," *Ohio State Journal of Criminal Law* 6, 442, http://moritzlaw.osu.edu/osjcl/Articles/Volume6_2/Bibas-FinalPDF.pdf; "Sizing Up the Prosecution: A Quick Guide to Local Prosecution," Harvard Law School, accessed September 1, 2016, 10, http://hls.harvard.edu/content/uploads/2008/07/prosecution2010.pdf.

[247] Spohn et al., "Prosecutors' Charging Decisions in Sexual Assault Cases," 12.

prosecuted" and that "prosecutors questioned the victim's credibility in a substantial number of the cases that were rejected."[248]

On top of laws that have failed to take enough burdens off of victims, juries that are often swayed by societal beliefs about rape, and prosecutors that screen for convictability, convictions rates for rape are low. David Bryden writes, "To begin, the case attrition rate in rape cases is shockingly high, and very few rapists are convicted of the crime."[249] According to RAINN, only seven cases out of 1,000 rapes will lead to a felony conviction.[250] In addition to the low conviction rate, sentences are weak when rapists are convicted.[251] Within this year, a rape sentence for a man named Brock Turner sparked outrage in California and nationwide.[252] Turner received a meager 6-month sentence in jail after being convicted of rape. Two witnesses saw Turner on top of an unconscious female lying behind a dumpster; the witnesses held Turner until the police arrived.[253] Liam Stack writes:

> The judge, identified by The Guardian as a Stanford alumnus, handed Mr. Turner, a champion swimmer, far less than the maximum 14 years after he was convicted, pointing out that he had no "significant" prior offenses, he had been affected by the intense media coverage, and "there is less moral culpability attached to the defendant, who is ... intoxicated," The Guardian said.[254]

With all these factors that victims have against them, they have rights to enforce to protect themselves; however, in 2013, Doug Sovern did a series about Marsy's law

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[248] Ibid., 88.

[249] Bryden and Lengnick, "Rape in the Criminal Justice System," 1194.

[250] "The Criminal Justice System: Statistics," Rape Abuse & Incest National Network, accessed September 1, 2016, https://www.rainn.org/statistics/criminal-justice-system.

[251] "97 of Every 100 Rapists Receive No Punishment, RAINN Analysis Shows," Rape Abuse & Incest National Network, accessed September 1, 2016, https://www.rainn.org/news/97-every-100-rapists-receive-no-punishment-rainn-analysis-shows.

[252] Liam Stack, "Light Sentence for Brock Turner in Stanford Rape Case Draws Outrage," *New York Times*, June 6, 2016, http://www.nytimes.com/2016/06/07/us/outrage-in-stanford-rape-case-over-dueling-statements-of-victim-and-attackers-father.html.

[253] Ibid.

[254] Ibid.

failing victims in the San Francisco Area of California[255] He reports that "Crime victims rarely invoke the rights afforded to them under Marsy's Law, and California prosecutors often ignore those who do insist on the protections that law enshrines in the state constitution."[256] Sovern also reveals that judges do not often ask if the victim has been notified or if the victim wishes to appear in court.[257] In response to Sovern's reporting, San Mateo DA, Steve Wagstaffe is now training lawyers to "to observe a victim's Marsy's rights even if the victim does not ask for them to be honored."[258]

A final criticism of the civilian justice system is the much-touted "rape kit backlog." Although the National Institute of Justice states that "there is no uniform definition of a backlog," they define a backlog as a rape kit that has not been tested within 30 days.[259] Aside from that definition, there are many instances of rape kit evidence that have not been submitted to crime labs by law enforcement.[260] A national study conducted by the National Institute of Justice found that "18% of unsolved rapes (an estimated 27,595) contained forensic evidence that was not submitted by law enforcement agencies to a crime laboratory for analysis" and that DNA was often the most common form of evidence in the rape cases.[261]

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[255] Doug Sovern, "KCBS Cover Story Pt. 2: Marsy's Law Fails San Francisco Assault Victim," October 2, 2013, http://sanfrancisco.cbslocal.com/2013/10/02/kcbs-cover-story-marsys-law-fails-for-san-francisco-assault-victim/.

[256] Doug Sovern, "KCBS Cover Story Pt. 3: California Crime Victims Rarely Invoke Marsy's Law Rights," October 3, 2013, http://sanfrancisco.cbslocal.com/2013/10/03/kcbs-cover-story-pt-3-california-crime-victims-rarely-invoke-marsys-law-rights/.

[257] Doug Sovern, "KCBS Cover Story Pt. 5:Series on Marsy's Law Failures Prompts Judicial Action, October 7, 2013, http://sanfrancisco.cbslocal.com/2013/10/07/kcbs-cover-story-series-on-marsys-law-failures-prompts-judicial-action/.

[258] Doug Sovern, "KCBS Cover Story Pt. 6: Bay Area DA Gets Victims Their Marsy's Law Rights," Octobre 8, 2013, http://sanfrancisco.cbslocal.com/2013/10/08/kcbs-cover-story-pt-6-bay-area-da-gets-victims-their-marsys-law-rights/.

[259] "Eliminating the Rape Kit Backlog," The National Center for Victims for Crime, accessed September 1, 2016, 10, https://victimsofcrime.org/docs/dna-resource-center-documents/eliminating-the-rape-kit-backlog---a-roundtable-to-explore-a-victim-centered-approach-(2010).pdf?sfvrsn=6.

[260] Kevin J. Strom et al., "The 2007 Survey of Law Enforcement Forensic Evidence Processing,"accessed September 1, 2016, vii, https://www.ncjrs.gov/pdffiles1/nij/grants/228415.pdf.

[261] Ibid.

There is uncertainty about how many untested rape kits there are in the state of California.[262] Governor Jerry Brown recently introduced legislation that requires that law enforcement submit the rape kit of a crime lab within 20 days of receiving it as evidence.[263] One of the reasons that rape kits do not get sent to the crime lab is cost.[264] A 2014 article from the SF Gate reads, "Police complain that costs range from $800 to $1,500 per DNA test. Also, the tests are not always necessary since many suspects are known to victims, charges may be dropped or a victim does not cooperate with investigators. The result is that rape kits by the thousands sit untested on police evidence shelves."[265] Lawmakers across California's 58 counties are trying to find ways to fix the issue of the rape kit backlog.[266] One of the recent successes is Bill AB1848, proposed by Assemblymen David Chiu of San Francisco.[267] The bill requires that law enforcement agencies across the state report to the California Department of Justice on how many rape kits they collect and give a reason (every four months) for why any rape kit goes untested.[268] Though California has been relatively forward thinking in regards to sexual assault, there is still room for improvement.

F. CONCLUSION

From starting the first Victim's Compensation Board, to signing the first affirmative consent education laws, California continues to expand and improve its effort

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[262] "The Backlog: California," End the Backlog, accessed September 1, 2016, http://www.endthebacklog.org/california.

[263] *An act to amend Section 680 of the Penal Code, related to DNA evidence,* California Legislature Assembly Bill No. 1517 (2013).

[264] "Why the Backlog Exists," End the Backlog, accessed September 1, 2016, http://www.endthebacklog.org/backlog/why-backlog-exists.

[265] "Clear California's Rape-Kit Testing Backlog," *San Francisco Chronicle*, February 5, 2014 http://www.sfgate.com/opinion/editorials/article/Clear-California-s-rape-kit-testing-backlog-5208773.phphttp://www.sfgate.com/opinion/editorials/article/Clear-California-s-rape-kit-testing-backlog-5208773.php.

[266] Melody Gutierrez, "Lawmakers Focus on Untested Rape Kits," *San Francisco Chronicle*, last modified February 28, 2016, http://www.sfchronicle.com/politics/article/Lawmakers-focus-on-untested-rape-kits-6859587.php.

[267] Alison Noon, "Bill Mandating Rape-Kit Data Clears California Assembly," *Mercury News*, last modified May 12, 2016, http://www.mercurynews.com/ci_25145/bill-mandating-rape-kit-data-clears-california-assembly.

[268] Ibid.

to prevent, and respond to, sexual assault. Victims have 17 rights, enforceable by themselves or by their legal representative. They have Rape Crisis Centers available to them in nearly every county in the state. California SANEs are trained at one of the top hospitals in the country, and are required by law to report sexual assault. Every law enforcement officer receives at least four hours of basic training in responding to sexual assault. Victims also have three different options to report the crime of sexual assault. The Victim Compensation and Government Claims Board provides financial support to victims of crime and the Victims Services Unit provides support to victims throughout the trial process. There are substantial resources available to victims in California.

Ideally, when a victim emerges from the process of the civilian justice system of the state of California, he or she has reported the crime to law enforcement, health care personnel, and/or a rape crisis center. He or she has received medical and mental healthcare. If his or her case goes to trial, he or she is guided through the process with the help of the assistant district attorney and the California Victim Service Unit. The victim's request for compensation to the Victim's Claim Board is approved and he or she is compensated for any health expenses, lost wages etc. After the trial is resolved, the victim enforces his or her Marsy's rights and is properly informed about release and parole information for the perpetrator. Finally, the victim receives any restitution owed to him or her.

Still, progressive as California is, there are also plenty of criticisms and shortcomings of the California justice system, as Doug Sovern's series made clear. Similarly, restraining orders seem to do very little in regard to actually protecting victims. The research is conflicting—about half the studies argue that protective orders do help, while the other half argue that they are ineffective.[269] A 1994 study from the National Institute of Justice reads: "A protection order alone, however, was not as likely to be effective against abusers with a history of violent offenses; women in these cases were more likely to report a greater number of problems with violations of the protection

[269] Doug Sovern, "KCBS Cover Story Pt. 5: Series on Marsy's Law Failures Prompts Judicial Action, October 7, 2013, http://sanfrancisco.cbslocal.com/2013/10/07/kcbs-cover-story-series-on-marsys-law-failures-prompts-judicial-action/.

order. The researchers noted that criminal prosecution of these individuals may be required to curb such behavior."[270] Thus, the right of the victim to be protected from the defendant might not be so effective in practice.

Another area that could use improvement is the recording of statistics for the state of California, specifically regarding sexual assault. The following chapter shows that the Department of Defense releases detailed reports annually documenting all sexual assault crime, and how each crime is addressed and resolved. Though the state of California provides an annual crime report, the report includes no information beyond felony arrests for rape and sexual assault. Beyond felony arrest, it would behoove the state of California to also include whether or not these rape and sexual assault cases go to trial, and, if they do proceed to trial, how many are settled on plea bargain, how many are convicted, and the resulting sentences. All of this information would allow the state, and the people of California, to regularly and accurately assess how sexual assault is being addressed in their state. Relative to the rest of the United States, California does a good job serving victims of sexual assault—but it could be doing better.

[270] Jeremy Travis, "Civil Protection Orders: Victims' Views on Effectiveness," National Institute of Institute of Justice Research Preview," accessed September 1, 2016, https://www.ncjrs.gov/pdffiles/fs000191.pdf.

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III. MILITARY JUSTICE SYSTEM AND SEXUAL ASSAULT

Roughly two years ago, I watched a documentary called "Invisible War." The documentary revealed the worst aspects of the military justice system: interview after interview showed male and female service members who had been sexually assaulted, retaliated against, and left with no justice. The film was so damning that it inspired Leon Panetta to change the way that sexual assault cases were disposed, inspired Senator Kristen Gillibrand to push a Military Justice Improvement Act, and inspired me to write this thesis. I am thankful that I watched it—I was able to learn more about how far the military justice has come since that documentary, and, surprisingly, how far the system had progressed in the 12 years before the documentary.

In response to media reports of sexual assaults on service members coming out of Iraq and Kuwait in 2003 and early 2004, the most damning of which came from the *Denver Post*, Secretary of Defense Donald Rumsfeld sent out a memorandum to order a review of care for victims of sexual assault.[271] A task force was assembled to perform a 90-day review of sexual assault policies and programs within both DOD and all the armed services; the task force then produced a report that included its 35 findings and nine recommendations.[272] The findings ranged from insufficient, dated, recordkeeping to obstacles in reporting a sexual assault.[273] Recommendations were broken into three sections for measures requiring immediate action, near-term action and longer-term action.[274] One of the outcomes of the task force and its report was the creation of the DOD Sexual Assault Prevention and Response Office (SAPRO), which was subsequently established in October 2005.[275]

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[271] Secretary of Defense, "Department of Defense Care for Victims of Sexual Assaults," Memorandum to Under Secretary of Defense (Personnel and Readiness), February 5, 2004, Washington, DC.

[272] "Task Force Report on Care for Victims of Sexual Assault," Department of Defense, April 2004. 1, http://www.sapr.mil/public/docs/reports/task-force-report-for-care-of-victims-of-sa-2004.pdf.

[273] Ibid., 18–28.

[274] Ibid., 46–55.

[275] "Mission and History," Department of Defense Sexual Assault Prevention and Response Office, accessed August 30, 2016, http://www.sapr.mil/index.php/about/mission-and-history.

Established in 1950, the Uniformed Code of Military Justice created a single code for all services and jurisdiction over all military members—regardless of whether they were in the United States, or whether the United States was at war.[276] Article 120 addresses sexual assault. The original Article 120 combined two charges (carnal knowledge and rape) and "prohibited a male from engaging in, 'an act of sexual intercourse with a female not his wife, by force and without her consent.'"[277] The write-up covered about a page.

By 1992, Congress had changed the rape statute to be gender-neutral, but the first significant revisions of Article 120 occurred in 2006 and 2011.[278] In the National Defense Authorization Act of FY 2006, Article 120 was amended and expanded to eight pages; the title was changed to "Rape, sexual assault and other misconduct."[279] The FY2006 NDAA substantially changed the way that the military justice system addresses sexual assault crimes. Among the changes were the expansion of the charges of rape and carnal knowledge to several different terms from aggravated sexual assault to forcible pandering (compelling another person to engage in prostitution).[280] Additionally, definitions were added to Article 120. The definitions were added because in the past there were no clear definitions and, as a result, judges were essentially creating their own definitions.[281] The main changes to Article 120 in 2006 were that it was more detailed and expanded, the military sex crimes expanded to be more in line with the civilian

[276] *The Army Lawyer: A History of the Judge Advocate General's Corps, 1775–1975,* United States Army, January 1, 1975, accessed September 1, 2016, 203, https://www.loc.gov/rr/frd/Military_Law/pdf/lawyer.pdf

[277] Ibid., 21.

[278] Ibid.,11.

[279] *National Defense Authorization Act For Fiscal Year 2006,* Pub. L. No 109–163, 119 Stat. 3136 (2006).

[280] Lisa M. Schenk, "Sex Offenses Under Military Law: Will the Recent Changes in the Uniform Code of Military Justice (UCMJ) Re-Traumatize Sexual Assault Survivors in the Courtroom?" *George Washington University Law School* 2014, 446, file:///Users/brandikatebluhm/Downloads/SSRN-id2446199.pdf.

[281] Ibid.

world's definition of sexual assault at the time, all sex offenses were located in one single article, and the requirement to prove lack of consent was eliminated.[282]

The most recent revision of Article 120 came in 2012. The 2012 amendment broke the Article into three separate statutes: adult offenses, child offenses, and other sexual offenses.[283] Changes also included language changes to shift the burden from the victim to the perpetrator (e.g., some of the language in the past required a victim to resist the assault and was removed, other language was added to make the verbiage gender neutral), and the elimination of defenses in Article 120.[284] Previous to the 2012 amendment, Article 120 included defenses of consent and mistake of fact (mistake of fact means that the perpetrator mistakenly thought that the accuser consented).[285] These changes occurred because many argued that while the changes in 2006 were needed and expansive, they were poorly written and required an update.[286]

A. REPORTING

Victims have two reporting options: restricted and unrestricted.[287] While a restricted report allows a victim to report confidentially (without an official investigation or notification to the command), victims who choose the unrestricted reporting option will receive an official investigation and the command will be notified.[288] Victims who choose unrestricted can report to any of the following: Law Enforcement/MCIO (Military Criminal Investigation Organization), Commander, Sexual Assault Response Coordinator

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[282] Schenk, "Sex Offenses Under Military Law," 447–448.

[283] Department of Defense, *Manual for Courts-Martial*, 1.

[284] Jim Clark, "Analysis of Crimes and Defenses 2012 UCMJ Article 120," *LexisNexis Emerging Issues Analysis,* June 28 2012. http://www.lexisnexis.com/documents/pdf/20120705060050_large.pdf.

[285] Ibid.

[286] Ibid.

[287] "Reporting Options," Department of Defense Sexual Assault Prevention and Response Office, June 15, 2016, http://www.sapr.mil/index.php/dod-policy/reporting-options.

[288] "Unrestricted Reporting," Department of Defense Sexual Assault Prevention and Response Office, June 15, 2016, http://www.sapr.mil/index.php/unrestricted-reporting.

(SARC), SAPR Victim Advocate, or health care personnel. Victims who elect to do a restricted report do not bring their report to law enforcement or their commander.[289]

Of course, there are forms. For both reporting options, SARCs explain the contents of a DD Form 2910, known as the "Victim Reporting Preference Statement."[290] The form confirms that the victim understands the difference between the two reporting options, services available to him or her, and that the victim has contact with medical and law enforcement support.[291] If the victim opts for an unrestricted report, DOD Law enforcement provides the victim with another form (DD 2701), which provides points of contact for investigation status, assistance available, compensation, reprisal or retaliation, legal assistance, and victim's rights information.[292]

If the victim makes an unrestricted report, the Commander must complete a 30-day checklist that functions as a process guide for the Commander; the Commander should accomplish the items on the list within 30 days of the report.[293] Items on the checklist include: putting the victim in touch with a SARC, making sure the victim has timely access to health care, and ensuring the safety of the victim.[294] The Commander him/herself must immediately put the victim in contact with the SARC, assist with arranging transportation to medical care for the victim if necessary, and immediately contact the MCIO.[295] SAPR Directive 6495.02 requires that a safety assessment be

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289 "Restricted Reporting," Department of Defense Sexual Assault Prevention and Response Office, June 15, 2016, http://www.sapr.mil/index.php/restricted-reporting.

290 Department of Defense, *Sexual Assault Prevention and Response (SAPR) Program Procedures*, DOD Instruction 6495.02, Washington, DC: Department of Defense, 2015, 35–36.

291 Department of Defense, *Victim Preference Statement* (DD2910), Washington, DC: Department of Defense, 2014.

292 Department of Defense, *Initial Information for Victims and Witnesses of Crime* (DD2701) (Washington, DC: Department of Defense, 2016).

293 "Commander's 30-Day Checklist for Unrestricted Reports for Sexual Assault," Department of Defense Sexual Assault Prevention and Response Office, accessed August 30, 2016, 2, http://www.sapr.mil/public/docs/policy/toolkit/Commander_Checklist_for_Unrestricted_Reports_20150122.pdf.

294 Ibid.

295 "Commander's 30-Day Checklist," Department of Defense.

conducted for every person that makes a restricted or an unrestricted report.[296] Each installation has personnel who are trained to do a safety assessment for the victim.[297] The trained person conducting the assessment can use a safety assessment tool (a form with a variety of open-ended questions for the victim) for guidance to assess the situation.[298] A SARC will also work on a safety plan with the victim and make sure that the victim has a completed safety plan worksheet.[299] The safety plan includes information on who to go to for support in the event of an emergency, what the victim will do if he or she encounters the alleged perpetrator of the assault, and strategies to stay safe in different environments.[300] For example, the victim and the SARC write down what the victim will say or do if he or she encounters the perpetrator while working, driving, or exercising—the victim writes down what he or she will say and what he or she will do to get away.[301] The plan additionally lists places to avoid and how to make the victim's home safer.[302]

If the individual conducting the safety assessment determines that the victim is in a high-risk situation (i.e., if the perpetrator has a criminal background, has been acting erratically, has access to weapons etc.), a High-Risk Response Team (HRRT) is assembled.[303] The team is composed of the following: the immediate commanders of both the victim and the accused, the victim's SARC and advocate, a representative from the criminal investigation office, a judge advocate, a representative from the Victim Witness Assistance Program (VWAP), the victim's health-care provider, and the person who did the safety assessment.[304] The role of the HHRT is to "continually monitor the

296 "SAPR ToolKit," Department of Defense Sexual Assault Prevention and Response Office, June 15, 2016, http://sapr.mil/index.php/dod-policy/sapr-toolkit.

297 "Commander's 30-Day Checklist," Department of Defense, 3.

298 "SAPR ToolKit," DOD Sexual Assault Prevention and Response Office.

299 Ibid.

300 Ibid.

301 "Sexual Assault Safety Plan Worksheet," Department of Defense Sexual Assault Prevention and Response Office, accessed September 1, 2016, http://www.sapr.mil/public/docs/policy/toolkit/SAFETY_PLAN_WORKSHEET_20151110_OGC_Aprvd.pdf.

302 Ibid.

303 Department of Defense, *Sexual Assault Prevention and Response (SAPR) Program Procedures*, DOD Instruction 6495.02, Washington, DC: Department of Defense, 2015, 80.

304 Department of Defense, *Sexual Assault Prevention and Response*, 80.

victim's safety, by assessing danger and developing a plan to manage the situation."[305] The team must make a report to the installation commander within 24 hours of being assembled.[306] The HRRT has regular meetings one a week and is required to address about 12 items; these items range from the alleged perpetrator's access to the victim to whether or not the alleged perpetrator or victim has a history of drug abuse.[307] The team continues to meet on a weekly basis until the victim is no longer determined to be high-risk.[308]

During the explanation of the DD 2910 form, the victim is informed that he or she can request a temporary or permanent expedited transfer.[309] The transfer can either be within the assigned command or a transfer to a completely different command.[310] The victim submits the request to his or her commanding officer (CO); the CO has 72 hours to approve or disapprove the request.[311] The expedited transfer request is intended for when the victim feels uncomfortable (not for when the victim feels unsafe).[312] An example of an uncomfortable instance might be that the victim is experiencing retaliation.[313] The guidance for a commander making the determination of whether or not to approve the request is "A presumption shall be established in favor of transferring a Service member (who initiated the transfer request) following a credible report of sexual assault."[314] The credible report is a report that is "determined to have credible information."[315] The commander makes this determination with the advice of a legal advisor and the

[305] Ibid.

[306] Ibid.

[307] Ibid., 81.

[308] Ibid., 80.

[309] Department of Defense, *Victim Preference Statement* (DD2910), Washington, DC: Department of Defense, 2014, 2.

[310] Department of Defense, *Sexual Assault Prevention and Response*, 6.

[311] "Expedited Victim Transfer Requests," United States Army, accessed August 30, 2016, http://sill-www.army.mil/usag/sharp/docs/transfer.pdf.

[312] Department of Defense, *Sexual Assault Prevention and Response*, 51.

[313] Ibid.

[314] Ibid.

[315] Department of Defense, *Sexual Assault Prevention and Response*, 117.

information from MCIO investigation (if available); if the commander disapproves the request, the commander must document why he or she arrived at that decision.[316]

B. HEALTHCARE

DOD Directive 6495.02 states:

> Sexual assault victims shall be given priority, and treated as emergency cases. Emergency care … shall consist of emergency medical care and the offer of a SAFE. The victim shall be advised that even if a SAFE is declined the victim shall be encouraged (but not mandated) to receive medical care, psychological care, and victim advocacy.[317]

All individuals who conduct a Sexual Assault Forensic Exam (SAFE) are required to have documentation that they meet the education, training and clinical practice standard.[318] They must be physicians, physician's assistants, nurses or nurse practitioners.[319] As there is no uniform nationwide certification to be a SAFE, some are certified through the International Association of Forensic Nurses and others go through trainings by state to be educated in forensic examination.[320] They must also pass a background check and obtain a letter of recommendation from his or her commander.[321] Training requirements for healthcare personnel include requirements of all DOD responders to sexual assault and healthcare specific training. The training is annual and is developed for each responder functional area (including health care); the topics covered include: DOD Policies and critical issues, local policies, procedures and resources, victim responses to sexual assault, deployment issues such as remote location assistance etc.).[322] First responders are defined as: "SARCs; SAPR VAs; healthcare personnel; DOD law enforcement; MCIOs; judge advocates; chaplains; firefighters and emergency medical

316 Ibid., 52.

317 Ibid., 91.

318 Ibid., 97.

319 "NCJ 228119 A National Protocol for Sexual Assault Medical Forensic Examinations Adults/ Adolescents," Department of Justice, April 2013, 59, https://www.ncjrs.gov/pdffiles1/ovw/241903.pdf.

320 "Protocol for Sexual Assault Medical Forensic Examinations," Department of Justice, 59–61.

321 Department of Defense, *Sexual Assault Prevention and Response*, 97.

322 Ibid., 92.

technicians."[323] Training is provided by each service.[324] In addition to required annual training, healthcare personnel are trained to contact a SARC or Victim Advocate if they receive a restricted report.[325]

A DOD Sexual Assault Forensic Examiner conducts the medical forensic exam using the DD Form 2911(DOD Sexual Assault Forensic Examination Form); the form is similar to the CalEMA 2–923, but it is 15 pages long instead of the state of California's eight-page form.[326] The DD Form 2911 is longer because includes a toxicology report and more information to record about who is involved in the case and about all personnel involved in conducting the exam. The exam begins with recording general information such as the names of people involved in the case (the SARC, the military criminal investigation officer, etc.) and general information about the exam (which facility it is conducted at, arrival and discharge dates, etc.).[327] Next, the reporting information is recorded (restricted or unrestricted) along with patient consent information.[328] As in the civilian exam, the exam covers relevant medical history, which includes pre-existing psychical injuries and "pertinent non-assault related history."[329] Pertinent non-assault related history includes detailed questions about the victim's sexual activity within the past five days of the assault.[330] Though this information seems invasive, any recent consensual sexual acts with a partner must be differentiated from anything that the perpetrator inflicted on the victim; for example, if the victim is a woman and she had consensual sex with her boyfriend before the assault and the boyfriend ejaculated, his DNA may be present in the rape kit. The exam also includes "post-assault hygiene

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[323] Department of Defense, *Sexual Assault Prevention and Response*, 91.

[324] Ibid.

[325] Ibid., 96.

[326] Department of Defense, *DOD Sexual Assault Forensic Examination (SAFE) Report(DD 2911)*, Washington, DC: 2015.

[327] Ibid., 1.

[328] Ibid., 1–2.

[329] Ibid., 3.

[330] Ibid.

activity" ranging from removing or inserting a tampon to changing clothes.[331] Following this information, the SAFE records a detailed description of the assault from the victim.[332]

After the questions and information gathering, the general physical examination begins. The SAFE must note the victim's physical appearance, general demeanor, and condition of clothing.[333] Clothing is collected and the entire body is scanned with a Wood's lamp.[334] As in the civilian exam, the SAFE collects dry and moist secretions, stains, foreign materials, and pubic hair.[335] For female exams, they collect two swabs from pubic mound, two vaginal, two cervical, two from the perineum, and two from the anus.[336] In male exams, the SAFE collects two penile swabs, two from the scrotum, and two anal swabs.[337]

The SAFE also conducts a toxicology kit in addition to the rape kit if the victim states that there was memory loss or loss of consciousness; the SAFE collects blood and urine samples.[338] Photos are taken of the victim's body and the exam methods are recorded as well as records of all the personnel involved in conducting the exam. The SAFE kit is turned over to the MCIO as evidence.[339] The average sexual assault forensic exam takes a few hours, but it varies depending on the case.[340] Before the SAFE Exam, The SARC will have assigned a SAPR Victim Advocate (VA) to the victim.[341] The

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[331] DOD Form 2911, 3.

[332] Ibid., 5.

[333] Ibid., 6.

[334] Ibid.

[335] Ibid., 8.

[336] Ibid.

[337] Ibid., 9.

[338] Ibid., 13.

[339] Ibid.

[340] "What is a Rape Kit?" Rape Abuse & Incest National Network, accessed September 1, 2016, https://www.rainn.org/articles/rape-kit.

[341] "Sexual Assault Response Report Flow Chart" Department of Defense Sexual Assault Prevention and Response Office, accessed September 1, 2016, http://www.sapr.mil/public/docs/policy/SexualAssault_sample_response_flowchart.pdf.

SAPR VA explains all the available resources, supports the victim, and makes sure that the victim gets mental health and medical care along with a forensic exam.[342]

C. LEGAL PROCESS

Once the report is received, the commander of the suspect must perform an initial disposition.[343] An initial disposition means that the commander will make a decision about how to move forward from the accusation. Here, the accused's military commander fulfills the role that the assistant district attorney plays in the civilian system.[344] According to the Manual Courts-Martial, a commander is defined as a "commissioned or warrant officer who, by virtue of rank and assignment, exercises primary command authority over a military organization or prescribed territorial area, which under pertinent official directives is recognized as a 'Command.'"[345] Up until 2012, the immediate commander of the accused made the decision to prosecute; however, due to criticism of commander bias, then Secretary of Defense Leon Panetta made it a requirement that "all commanders within the Department of Defense who do not possess at least a special court-martial convening authority and who are not in the grade O–6(i.e., colonel or Navy Captain) or higher" could not have disposition authority. In other words, unless the Commander is an O–6 or higher he or she cannot make the decision of whether or not the case goes to trial—the decision will go up the chain of command to an O–6.[346]

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342 "Sexual Assault Response Report Flow Chart"

343 Department of Defense, *Manual for Courts-Martial*, II-25.

344 "Military Justice Overview," Department of Defense Victim and Witness Assistance Council, accessed August 30, 2016, http://vwac.defense.gov/military.aspx.

345 Department of Defense, *Manual for Courts-Martial*.

346 Secretary of Defense, "Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases," Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff Commanders of the Combatant Commands, Inspector General of the Department of Defense, Apr 20, 2012, Washington, DC. Commander bias has been revealed by many different sources: "Snapshot Review of Sexual Assault Report Files at the Four Largest U.S. Military Bases," Office of Kirstin Gillibrand, accessed September 1, 2016, http://www.gillibrand.senate.gov/imo/media/doc/May%202016%20Military%20Sexual%20Assault%20Report.pdf; Amy Herdy and Miles Moffeit, "Betrayal in the Ranks," *Denver Post*, accessed September 1, 2016, 4, http://extras.denverpost.com/justice/tdp_betrayal.pdf; Robert Draper, "The Military's Rough Justice on Sexual Assault," *New York Times,* November 26, 2014, http://www.nytimes.com/2014/11/30/magazine/the-militarys-rough-justice-on-sexual-assault.html.

Whereas an assistant DA has two basic choices—whether or not to take the case to trial—a commander also has the choice in a case of sexual assault of taking administrative action against the alleged perpetrator or using a non-judicial punishment.[347] Administrative action is a corrective measure; examples of administrative action are "counseling, admonition, reprimand, exhortation, disapproval, criticism, censure, reproach, rebuke, extra military instruction, or the administrative withholding of privileges or any combination of the above."[348] Administrative action might be taken if the service member used drugs or for discreditable nature.[349] Administrative action can be a sole punishment or it can be tacked on to another disposition, such as nonjudicial action.

A nonjudicial punishment is a more serious response than administrative action, but less serious than court-martial.[350] The simplest way to describe the nonjudicial punishment procedure is as a trial, less serious than a court-martial, before the commander. The commander issues a notice to the service member of what the allegations against him or her are and of his or her rights.[351] The service member has the right to demand a court-martial instead, but if he or she does not, the nonjudicial punishment procedure continues by requesting personal appearances.[352] A service member might demand a court-martial because he or she would like to be judged by impartial members of a court-martial rather than sole judgment an O–6 commander. Personal appearance entitles the accused service member to present a defense, witnesses, to have the proceeding be public and to examine evidence.[353] The service member can waive the right to personal appearance as well. A person might waive his or her right to personal appearance for the same reason that an accused person might choose not to testify.

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[347] "Military Justice Overview," Victim and Witness Assistance Council.

[348] Department of Defense, *Manual for Courts-Martial*,II-26.

[349] "Good Order and Discipline Data," Coast Guard, accessed September 1, 2016, https://www.uscg.mil/announcements/alcoast/283-15_ALCOAST.txt.

[350] Department of Defense, *Manual for Courts-Martial*, V-1.

[351] Ibid., V-2–V-3.

[352] Ibid., V-3.

[353] Department of Defense, *Manual for Courts-Martial*.

Once the commander has gone through the required procedure and the proceedings, the commander must determine a punishment. Maximum punishments for a nonjudicial disposition range from arrest in quarters for up to 30 days to forfeiture of half the service member's pay for two months.[354] Other punishments include "reduction to the lowest or any intermediate pay grade"—or even "confinement on bread and water for not more than three days."[355] Bread and water has been used as recently as 1992 and is now referred to as "diminished rations."[356]

If the commander decides that the offense should be disposed with an action but that administrative action or nonjudicial punishment are insufficient, the commander takes the case to court-martial.[357]

There are three types of court martial summary, special, and general.[358] Section 816, Article 16 of the MCM classifies the different court-martials.[359] Summary court-martials usually involve minor offenses and enlisted service members.[360] Special courts-martials consist of three members, and general court-martials consist of a military judge and no less than five members.[361] General court-martials cover capital offenses, while special courts martial have jurisdiction over any noncapital offenses.[362] According to the DOD's Victim and Witness Assistance Council, the general court-martial is reserved for the military's most serious crimes.[363] Because sexual assault is such a serious crime, if the case is referred to court-martial, it will be referred to a general court-martial.

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[354] Department of Defense, *Manual for Courts-Martial*, V-4–V-5.

[355] Ibid., V-5.

[356] Steve Mcgonigle "Court Limits Bread and Water Punishment," *Seattle Times*, October 1, 1992, http://community.seattletimes.nwsource.com/archive/?date=19921001&slug=1516008.

[357] "Military Justice Overview," DOD Victim and Witness Assistance Council.

[358] Ibid.

[359]" Department of Defense, *Manual for Courts-Martial*, A2-6.

[360] Ibid., II-179.

[361] Ibid.

[362] Department of Defense, *Manual for Courts-Martial*, II-179.

[363] "Military Justice Overview," DOD Victim and Witness Assistance Council.

Today, Rule 1004 of the MCM, states that sexual assault can be adjudged as a capital offense if the victim was "under the age of 12 or if the accused maimed or attempted to kill the victim."[364] If the case is a capital case, the members serving on the court-martial number at least twelve.[365]

Article 32 of the MCM requires that a thorough and impartial investigation take place before a case goes to courts-martial.[366] Before any case moves on to trial, the staff judge advocate of the convening authority has to submit a written statement, or pretrial advice, containing his or her conclusions about the evidence and recommendation about the action that the convening authority will take.[367] The pretrial advice is written and signed by the JAG and its content includes a summary of the evidence, discussion of different factors (aggravating, mitigating, extenuating), and a recommendation on how to dispose of a case.[368] The advice must be independent and informed.[369]

1. Roles of a General Court-Martial

The five members who serve on a court-martial can be any commissioned officer, warrant officer, or any enlisted member who is not a member of the same unit; the accused should not be tried in a court-martial with members who are junior in rank or grade to the accused.[370] The convening authority (Commander) selects the members who serve on the court-martial by "reason of age, education, training, experience, length of service, and judicial temperament."[371] The members of a court-martial for a Navy lieutenant will look different the members of a court-martial for an enlisted rank service member; for example, members of a court-martial for a lieutenant in the Navy might consist of two LCDRs, a CDR and a LT, while a Petty Officer Third Class (E-3) might be

364 Department of Defense, *Manual for Courts-Martial*, II-132.

365 Ibid., A2-7–A2-8.

366 Ibid., A2-9.

367 Ibid., II-40.

368 Ibid., II-40.

369 Ibid., II-40.

370 Department of Defense, *Manual for Courts-Martial*, A2-7–A2-8.

371 Ibid., A2-7–A2-8.

judged by three E-3s, an E-4 and an E-5. A Lieutenant Junior Grade or an Ensign would not be a panel member for a LT because those are lower ranks than an LT.

The president of the court-martial can be considered the leader of the members; the president is the detailed senior ranking officer. He or she presides over the closed sessions, and speaks for the members when they arrive at a decision for the findings of the court-martial.[372] The Judge Advocate General designates the judge of a general court-martial to the position.[373] Counsel must be certified under Article 27(b), "A member of the bar of a Federal court or the highest court of a state."[374] The trial counsel prosecutes the case and represents the United States.[375] The accused has the right to be represented by military counsel and the defense counsel represents the accused.[376] Other roles in the court-martial trial include: interpreters, reports, escorts, bailiffs, clerks, and guards.[377]

The referral starts the court-martial process; it is "the order of a convening authority that charges against an accused will be tried by a specified court-martial."[378] After the referral occurs, the pre-trial matters take place.

2. Pre-trial

Before the trial, discovery takes place; trial counsel discloses their evidence (documents, objects, witness information) to the defense.[379] Depositions may also take place—depositions are "out-of-court testimony of a witness under oath in response to questions by the parties, which is reduced to writing or recorded on videotape, or audiotape or similar material."[380] Depositions are used to secure testimony of witnesses who may not be available at the time of the trial or at the time of the Article 32

372 Department of Defense, *Manual for Courts-Martial*, II-43.

373 Ibid.

374 Ibid.

375 Ibid., II-44.

376 Ibid., II-34, 45.

377 Ibid., II-46.

378 Ibid., II-52.

379 Ibid., II-56.

380 Ibid., II-59.

investigation.[381] Depositions are also used "for the purpose of contradicting or for impeaching the testimony of the deponent as a witness."[382]

In this phase, there is also the possibility that a pre-trial agreement will occur; in the civilian world, a pre-trial agreement is often referred to as a "plea bargain." The pre-trial agreement is a promise for the accused to make a certain plea in exchange for certain stipulations, such as suspending part of a sentence or deferring confinement.[383] The case must go to trial within 120 days of the referral of charges.[384] Similar to the civilian world, the sexual assault crime is considered a crime against the United States, not against the victim; thus, the victim has no power over whether or not the case goes to trial or whether or not there is a pre-trial agreement.

3. Trial Procedure

The military judge decides on the time that the court-martial trial occurs and the uniform to be worn.[385] Court-martial trials are open to both military and civilian public.[386] Although they are open to the public, getting access to a court-martial can be very difficult. Often, the trials are held on military bases where the public may not have access and they are not often publicized.[387] The Reporters Committee for Freedom of the Press recommends contacting the Office of Public Affairs and asking to be notified of court-martial proceedings.[388] Sometimes the court-martials can be closed; a hearing might be closed if privileged information were to be released, such as information shared between a victim and his or her therapist.[389] The trial starts when the military judge calls

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[381] Department of Defense, *Manual for Courts-Martial*, II-59.

[382] Ibid.

[383] Ibid., II-68.

[384] Ibid., II-71.

[385] Ibid., II-74.

[386] Ibid., II-80.

[387] "Covering courts-martial: Finding the docket," Reporters Committee for Freedom of the Press, accessed September 1, 2016, https://www.rcfp.org/reporters-guide-military-justice/covering-courts-martial-finding-docket.

[388] Ibid.

[389] David Vergun, "Legislation changes UCMJ for Victims for Sexual Assault," *United States Army*, January 7, 2015, https://www.army.mil/article/140807.

the session to order.[390] After the session is called to order, the parties (who are in the room) are announced, counsel states their legal qualifications, and the judge informs the accused of his or her rights.[391]

The arraignment happens in a court-martial session and consists of the charges being read and the accused making a plea.[392] The accused has the following pleas available during a court-martial: "guilty; not guilty to an offense as charged, but guilty of a named lesser included offense; guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any; or, not guilty."[393] When the accused make a lesser plea than guilty, their counsel must submit a written description of the plea.[394] The court-martial offers more plea options than that State of California's three options of guilty, not guilty, and no contest.

Similar to the civilian justice system, the prosecution has the burden of proof in a court-martial trial.[395] Evidence is presented, trial counsel (prosecution) opens their argument, and defense counsel can reply.[396] Instructions on findings can be given to the members of a court-martial either before or after counsel makes their arguments.[397] The MCM defines Instructions as follows: "Instructions consist of a statement of the issues in the case and an explanation of the legal standards and procedural requirements by which the members will determine findings."[398]

Unlike civilian trials, the number of votes for a conviction is two-thirds versus unanimous; however, if the sentence could be life imprisonment, the vote must be three-fourths, and if the sentence might be death, then the vote must be unanimous.[399] After the

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[390] Department of Defense, *Manual for Courts-Martial*, II-88.

[391] Ibid., II-88–II-89

[392] Ibid., II-91

[393] Ibid., II-101.

[394] Ibid.

[395] Ibid., II-110.

[396] Ibid., II-116.

[397] Ibid., II-117.

[398] Ibid., II-117.

[399] Ibid., A2-15.

court-martial arrives at a decision, the president announces the findings (the verdict) while all parties are present.[400] After the findings are announced, trial counsel and defense counsel can present arguments to aid in the sentencing.[401]

D. VICTIMS RIGHTS AND RESOURCES

Victims' rights are laid out in the DD Form 2701 and are listed in Table 2.

Table 2. DD Form 2701—Department of Defense[402]

1. The right to be treated with fairness and respect for your dignity and privacy
2. The right to be reasonably protected from the accused offender
3. The right to submit a written statement for the consideration of the Convening Authority prior to taking action on findings and sentence
4. The right to be reasonably heard at: 1) a public hearing concerning the continuation of any pretrial confinement of the accused; 2) a sentencing hearing related to the offense; 3) a public Military Department Clemency and Parole Board hearing related to the offense
5. The right to reasonably confer with the prosecutor/Trial Counsel in the case
6. The right to reasonable, accurate, and timely notice of public preliminary hearings, pretrial confinement hearings, court proceedings, and clemency and parole hearings related to the offense
7. The right to be present at all public proceedings related to the offense unless the hearing officer or military judge determines that your testimony would be materially altered if you as the victim heard other testimony.
8. The right to proceedings free from unreasonable delay
9. The right to be provided information, if applicable, about the conviction, sentencing, imprisonment, Convening Authority's action, appellate review, and release of the offender
10. The right to receive available restitution

[400] Department of Defense, *Manual for Courts-Martial*, II-120.

[401] Ibid., II-121.

[402] Source: Department of Defense, *Initial Information for Victims and Witnesses of Crime* (DD2701) (Washington, DC: Department of Defense, 2016).

The military protects the victim's "right to be treated with fairness and respect for his or her dignity and privacy" through reporting options (which include a confidential reporting option), assigning a SARC to each case of sexual assault, and making victim advocates available to assault victims.[403] SARCs are assigned to each sexual assault case, and they monitor each case to which they are assigned. The right to be reasonably protected from the accused offender is protected through the requirement that a safety assessment be performed. If the assessment determines that the victim's safety is threatened, an HRRT is assembled. Additionally, an expedited transfer option is available to victims who would feel safer in a different command.

Rights 3–7 on the DD Form 2701 are protected through the support of the Victim/ Witness Responsible Official (located at each command), who helps the victim deal with questions and concerns during the trial.[404] The official can point them to forms, resources, etc.

The military protects the right to proceedings free from unreasonable delay through requiring that the trial begin within 120 days of charges being filed. The right to "information about the conviction, sentencing, imprisonment," "Convening Authority's action, review," and "release of the offender" is protected through the Victim Witness Assistance program providing the victims with a form to elect that right.[405] The form is DD Form 2704, titled the "Victim/Witness Certification and Election concerning Prisoner Status."[406] The right to restitution is protected through using restitution as a "condition of a pretrial agreement to plead guilty to an offense, or as a condition of clemency or parole."[407]

Additionally, the Department of Defense Victim and Witness Assistance Council provides links on its website for the National Association of Crime Victim Compensation

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[403] "Victim and Witness Assistance Links," Department of Defense Victim and Witness Assistance Council, accessed June 16, 2016, http://vwac.defense.gov/Related-Sites/.

[404] Ibid.

[405] Department of Defense, *Initial Information for Victims and Witnesses of Crime* (DD2701) (Washington, DC: Department of Defense, 2016).

[406] Ibid.

[407] Ibid.

Boards, which vary by state.[408] Victims can seek resources from states to assist with costs and/or financial losses, such as lost wages.[409] Sexual assault victims are also entitled to a no-cost copy of the trial record.[410]

In 2014, the Department of Defense received 6,131 reports of sexual assault (rape, abusive sexual contact, aggravated sexual assault etc.).[411] Of those reports, 1,471 were restricted and thus remained confidential, and an official investigation was not initiated.[412] The remaining 4,660 unrestricted reports resulted in 3,934 investigations.[413] From these investigations, 2,625 subjects were identified as warranting action from commanders.[414] Of these cases, there was sufficient evidence to move forward with 1,997 of the subjects.[415] Some 1,550 subjects were subsequently charged with sexual assault (the rest received charges for other misconduct).[416] The misconduct charges included: court-martial preferred (but not for charges other than sexual assault), nonjudicial punishment, administrative discharge and other adverse administrative actions.[417] Commander action on the sexual assault charges resulted in: 988 subject court-martials initiated, 318 nonjudicial punishments, 111 administrative discharges, and 123 administrative actions.[418] The initiated court-martials resulted in 588 subjects proceeding to trial and 434 were convicted.[419] The punishments for the convicted

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408 "Military Justice Overview," DOD Victim and Witness Assistance Council.

409 DD Form 2701. 2.

410 DD Form 2703, 2.

411 "Department of Defense Annual Report on Sexual Assault in the Military, Fiscal Year 2014," Department of Defense, April 29, 2015, 11, http://www.sapr.mil/public/docs/reports/FY14_Annual/DOD_FY14_Annual_Report_on_Sexual_Assault_in_the_Military.pdf.

412 Ibid., 20.

413 Ibid.

414 "Department of Defense Annual Report on Sexual Assault in the Military, Fiscal Year 2014," Department of Defense, April 29, 2015, 20, http://www.sapr.mil/public/docs/reports/FY14_Annual/DOD_FY14_Annual_Report_on_Sexual_Assault_in_the_Military.pdf.

415 Ibid., 23.

416 Ibid.

417 Ibid.

418 Ibid., 28.

419 Ibid.

subjects were: confinement, reductions in rank, fines, discharge, dismissal, restriction and hard labor.[420]

E. CRITICISMS AND SHORTCOMINGS

Some of the most damning criticisms of the way that the military handles sexual assault have come from the media. Investigative series like "Betrayal in the Ranks" by the *Denver Post* and the Academy Award-nominated documentary "Invisible War" thrust sexual assault in the military into public discussion. These pieces highlighted issues such as, retaliation, commander bias, and weak sentences. The same societal beliefs about rape in the civilian justice system are present in the military system. In addition to these detrimental biases about rape, aspects of military culture have been criticized as harmful to victims of sexual assault.[421] The military's masculine warrior culture emphasizes being tough, while the aspect of task and social unit cohesion in the military stresses doing anything to keep the unit together and to complete the mission at hand, even if that means being lenient to enforce sexual assault response. These factors may prevent victims from reporting, and, if they do report, these cultural influences may result in their peers retaliating against them.[422]

1. Retaliation

According to a report from Human Rights Watch, 62 percent of service members who reported a sexual assault experienced retaliation in 2015.[423] A similar study by the RAND Corporation reported that 52 percent of female service members who reported a sexual assault experienced some form of social (bullying, disabling of a car, harassed by multiple phone calls, etc.) or professional (being denied training opportunities, assigned

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420 "Department of Defense Annual Report on Sexual Assault in the Military, Fiscal Year 2014," Department of Defense, April 29, 2015, 28, http://www.sapr.mil/public/docs/reports/FY14_Annual/DOD_FY14_Annual_Report_on_Sexual_Assault_in_the_Military.pdf.

421 Torreon, *Military Sexual Assault: Chronology of Activity*.

422 "Snapshot Review of Sexual Assault Report Files at the Four Largest U.S. Military Bases," Office of Kirstin Gillibrand, accessed September 1, 2016, http://www.gillibrand.senate.gov/imo/media/doc/May%202016%20Military%20Sexual%20Assault%20Report.pdf.

423 "Embattled," Human Rights Watch, last modified May 18, 2015, https://www.hrw.org/report/2015/05/18/embattled/retaliation-against-sexual-assault-survivors-us-military.

to pick up garbage, etc.) retaliation.[424] The problem of retaliation is so serious that, in April 2016, DOD released a strategy to prevent and respond to retaliation.[425] The strategy defined retaliation as reprisal, ostracism, and maltreatment.[426] Reprisal involves "unjustified personnel actions" that are taken against victims of sexual assault.[427] For example, a service member who reports sexual assault might receive a poor performance evaluation after reporting for no apparent reason.[428] Ostracism means that the victim was treated like an outcast and/or bullied.[429] According to the Human Rights Watch report, victims who reported sexual assault have been, "assailed with obscenities and insults—"whore," "cum dumpster," "slut," "faggot," "wildebeest." [430] Maltreatment involves an act against the victim from an individual that he or she must take orders from.[431] The victim might be ordered to do work below his or her level, such as picking up garbage.[432] The Human Rights Watch Report was only able to find two cases where service members were punished for retaliating against a fellow service member who reported a sexual assault.[433] Goals of the new retaliation strategy include creating a retaliation response process (for victims, commanders, and sexual assault first responders), the creation of a "culture intolerant of retaliation," and creating standard definitions for retaliation.[434] The

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[424] Andrew R. Morral et al., *Sexual Assault and Sexual Harassment in the U.S. Military: Highlights from the 2014 RAND Military Workplace Study,* Santa Monica, CA: RAND Corporation, 2015, http://www.rand.org/pubs/research_briefs/RB9841.html; "Embattled," Human Rights Watch, last modified May 18, 2015, https://www.hrw.org/report/2015/05/18/embattled/retaliation-against-sexual-assault-survivors-us-military.

[425] "DOD Retaliation Prevention and Response Strategy: Regarding Sexual assault and Harassment Reports," Department of Defense Sexual Assault Prevention and Response Office, accessed September 1, 2016, http://sapr.mil/public/docs/reports/Retaliation/DOD_Retaliation_Strategy.pdf.

[426] Ibid., 5.

[427] Ibid.

[428] "Embattled," Human Rights Watch.

[429] Ibid.

[430] Ibid.

[431] Ibid.

[432] Ibid.

[433] Ibid.

[434] "DOD Retaliation Prevention and Response Strategy: Regarding Sexual assault and Harassment Reports," Department of Defense Sexual Assault Prevention and Response Office, accessed September 1, 2016, http://sapr.mil/public/docs/reports/Retaliation/DOD_Retaliation_Strategy.pdf.

culture intolerant of retaliation is described in the strategy as having "strong ethics and compliance programs and training efforts, along with robust systems of accountability."[435]

2. Commander Bias

There have been several cases of commanders protecting perpetrators of sexual assault.[436] One of the worst examples is the case of Sergeant Major of the Army Gene McKinney. McKinney, a Vietnam veteran and Bronze-Star recipient, was the first African-American to achieve this rank. In 1998, amid a series of sexual assault allegations roiling the U.S. Army, McKinney successfully used the "good soldier" defense and achieved acquittal of sexual assault even though six women testified against him.[437] Elizabeth Hillman writes, "McKinney took full advantage of this military evidentiary doctrine by parading former superiors and subordinates before the court-martial panel to testify about his sterling character and soldierly behavior."[438] McKinney used examples of military professionalism (specifically, responsibility) to overshadow his bad sexual behavior, and it worked. In 2013, at a Joint Chiefs of Staff hearing, the Chairman of the Joint Chiefs of Staff stated that the military might be to forgiving of a service member who commits sexual assault if the service member has four deployments, ribbons, and a Purple Heart.[439] This is yet another example of the military culture valuing certain aspects of professionalism over bad behavior. In some cases, the so-called "professional" character out weighs the crimes of rape and sexual assault. A report from the office of Senator Kristen Gillibrand on sexual assault in four major military bases reads: "Much like the 2013 case file request, the 2014 cases expose a troubling command culture that seems to favor the higher-ranking accused, and also seems to value closing

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[435] Ibid., 12.

[436] Amy Herdy and Miles Moffeit, "Betrayal in the Ranks," *Denver Post*, accessed September 1, 2016, 4, http://extras.denverpost.com/justice/tdp_betrayal.pdf.

[437] Elizabeth Lutes Hillman, "The 'Good Soldier' Defense: Character Evidence and Military Rank at courts-Martial," *Yale Law Journal*, 108, no 4, (January 1999): 879, doi:10.2307/797397.

[438] Hillman, "The 'Good Soldier' Defense," 880.

[439] "Quotes You Should Read," Office of Kirstin Gillibrand, accessed August 30, 2016, http://www.gillibrand.senate.gov/mjia.

cases over pursuing justice."[440] The protection of these perpetrators translates into the case not even making it to court-martial or the accused receiving an exceptionally weak sentence.

F. CONCLUSION

Ideally, at the end of the military justice system process, the victim has received support from his or her assigned SARC, Victim's Advocate, and Commander, has received a safety assessment, has been offered healthcare, and mental health and crisis intervention services. If requested, he or she has received an expedited transfer. The victim has successfully enforced his or her rights, and has seen the case disposed of through administrative action, nonjudicial punishment or through court martial.

In comparison to California, and the rest of the United States, the Department of Defense seems to lag behind in regard to sexual assault. The first policy only surfaced a short ten years ago; however, in those ten years, the DOD has made a lot of significant strides forward in the realm of sexual assault prevention and response. The DOD is constantly assessing what it does well and what it needs to improve. Additionally, Congress holds DOD accountable through hearings before the Armed Services Committee, the NDAA, and so on.

As far as what works well in the military justice system, sexual assaults are treated as an emergency. The DOD requires annual sexual assault training for all members of the DOD.[441] All victims are assigned a SARC and a Victim's Advocate to help guide them through the system. Commanders are required to document all of their decision-making and to receive advice from Judge Advocate Generals before making a decision. Trained personnel perform safety assessments for the victim and, if the victim is unsafe, the HRRT is assembled to ensure the victim's safety. Victims who feel uncomfortable are able to apply for expedited transfer and, if a commander does not grant

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[440] "Snapshot Review of Sexual Assault Report Files at the Four Largest U.S. Military Bases," Office of Kirstin Gillibrand, accessed September 1, 2016, http://www.gillibrand.senate.gov/imo/media/doc/May%202016%20Military%20Sexual%20Assault%20Report.pdf.

[441] Department of Defense, *Sexual Assault Prevention and Response (SAPR) Program Procedures*, DOD Instruction 6495.02, Washington, DC: Department of Defense, 2015, 82.

the transfer, he or she must provide a written explanation of the decision. There are three routes to punish perpetrators of sexual assault, including the court-martial trial. Administrative action and nonjudicial punishment allow the commander to punish a perpetrator even if the case does not go to trial. Finally, the Department of Defense produces annual reports that include statistics on sexual assault response, and assessments of sexual assault response and prevention, as well as plans for improvements.

Despite the significant progress of the last ten years, there are still questions about whether commanders are capable of making unbiased decisions about how to dispose of a sexual assault case within their command. Additionally, there is no compensation from the Department of Defense available to victims; they have to seek compensation from the state that they were in when they were assaulted. DOD offers fewer victims rights than the rights offered in California. The military justice system is a work in progress. As it stands today, the military justice system offers noteworthy support to victims of sexual assault, and, if it keeps improving at the rate of the last decade, it will be a truly outstanding system.

IV. ANALYSIS AND CONCLUSIONS

This chapter explores the more profound and the subtle differences between the two systems. Looking at the rights, support, protection, and compensation offered to the victim, as well as trainings, record keeping, and decisions to go to trial, will provide a strong side-by-side evaluation of the systems. Drawing conclusions from this evaluation will pave a way forward to improve both systems and to best benefit victims of sexual assault.

1. Rights

California offers seven more victims' rights than the military justice system; however, some of the rights offered individually in California are combined within the military justice system. For example, rights 10 through 12 on Marsy's Card are included in the tenth right listed on DD Form 2701. Still, there is no exact parity. The military justice system does not offer the following as victims' rights: The Prevention of the Disclosure of Confidential Information, Refusal to be Interviewed by the Defense, and the Prompt Return of Property.

2. Victim Support

Regarding support, civilian victims are able turn to rape crisis centers, victim advocates, and victim assistance programs. In the state of California, Victim Advocates are generally volunteer positions and Rape Crisis Centers cannot necessarily always provide a victim advocate especially in rural areas.[442] The military, on the other hand, assigns SARCS. The job of the SARC is to monitor the case; thus, in addition to a victims advocate, a SARC is paid to monitor the case's progress from start to finish. Furthermore, Commanders are required to complete 30-day checklists regarding reports; thus, multiple individuals are required by their job to monitor the case. Military victims who report sexual assault are assigned a SARC, a VA, and a Victim Assistance

[442] "Stopping the Stigma: Changing Public Perceptions of Sexual Assault in Rural Communities," California Coalition Against Sexual Assault, accessed September 1, 2016, http://www.calcasa.org/wp-content/uploads/2010/12/Rural-Info-Packet-v2-FINAL-UPLOAD-12.28.10.pdf.

Responsible Official (who is available at every base). Thanks to the military's resources and ability to provide three individuals, who are required to monitor the case and provide support to victims, the military provides better support.

3. Protection of the Victim

Regarding protection of the victim, the military requires that a safety assessment occur for every report of sexual assault and that a HRRT be assembled if the assessor determines that the victim is not safe and meets on a weekly basis until it is determined that the victims is safe; all of these procedures are required. On the civilian side, the victim must initiate a restraining order. The restraining order takes a lot of work on the part of the victim, who must navigate through the bureaucratic processes of the court system. Although judges must consider the safety of the victims when setting bail, there is little that the civilian justice system can do to protect the victim. The military justice system does a better job of protecting victims of sexual assault because of its ability to assess safety and to set up an HRRT.

4. Training

All service members and civilians of the Department of Defense are required to attend mandatory Sexual Assault trainings. Reporting has increased since SAPRO was established in 2005, which is a positive reflection on training.[443] Additionally, first responders are required to pass training. Though all civilians are not required by the state to attend sexual assault training, civilian first responders receive sexual assault training in the state of California.

Regarding medical training for examiners, there is no nationwide certification for forensic examiners. California requires special training from the UC Davis Medical center and a background check as well.[444] Both systems are relatively similar in their examiner requirements, as are the exam procedures. Military SAFEs must meet national

[443] "SAPR Statistics," Department of Defense Sexual Assault Prevention and Response Office. Accessed September 1, 2016, http://www.sapr.mil/public/docs/reports/FY14_POTUS/FY14_DOD_Report_to_POTUS_Appendix_A.pdf.

[444] "Job Listings," California Sexual Assault Investigators Association, accessed September 1, 2016, http://www.csaia.org/resources-jobs.asp.

clinical standards, pass a background check, and provide recommendation from the commander.

5. Record Keeping

The DOD provides detailed statistics about sexual assault, and how each case is handled, in annual reports. The state of California provides a "Crime in California" report (which is not nearly as detailed as the DOD annual SAPR reports) and focuses on all crime in California, versus just sexual assault. Ultimately, California rape/sexual assault crime statistics stopped at felony arrests and then no clear information was provided on whether or not the cases went to trail, resulted in conviction, or the resulting sentences. The military does a far superior job of recording how it addresses sexual assault every year.

6. Compensation

The military relies on individual state Victims Claims boards for victims to get support after violent crime. The state of California has its own Victims Claims Board. In California, restitution can be used as a sentence and there are different mechanisms to track restitution. Military restitution is not a sentence, but can be added on as a punishment. The civilian justice system is superior in providing compensation for victims of sexual assault.

7. Decision to Go to Trial

The California District Attorney has the choice of either taking a case to trial or not taking an action. A commander has four total choices, to refer the case to court-martial, to take action through nonjudicial punishment, to take administrative action or to not take any action. 38 percent (988 out of 2,625 subjects) of subjects that were considered for possible action by DOD commanders the military that went to court-martial in 2014; 44 percent of those 988 subjects were convicted of sexual assault and their punishments included confinement, reductions in rank, fines, punitive discharge, restriction and hard labor.[445] The numbers for rape in California are not available but roughly 49 percent of all felony arrest resulted in a conviction (217,688 convictions out

[445] "SAPR Statistics," United States Sexual Assault Prevention and Response Office.

of 439,958 felony arrests).[446] Table 3 shows a summary of the differences between the two systems side-by-side.

Table 3. Evaluation Table

Topic	**State of California**	**Military**
Number of Rights	17	10
Victim Support	Rape Crisis Center; Victim Services Unit; Volunteer Victim's Advocate; Law Enforcement	Mandatory SARC; Mandatory SAPR Victims' Advocate; MCIO
Protection of Victim	Civil Restraining Order; Judge taking safety into account	Safety Assessment; High Risk Response Team
Training	First responder training; medical personnel training	Mandatory SAPR training for all service members and civilians; first responder training; medical personnel training
Record Keeping	Provides annual statistics about sexual assault, and how man felony arrests occur	Provides detailed annual statistics about sexual assault, and how each case is handled (whether it goes to trial, conviction rate, sentences)
Compensation	Victims Claims Board; restitution as a sentence	—
Decision to Go to Trial	Assistant District Attorney	Commander (O-6 Rank or Higher)

B. ANALYSIS

The progress that has occurred in the military justice system over the last twelve years has been remarkable. The DOD has created a comprehensive sexual prevention and response policy, trainings, and an office to oversee and enforce that policy. Such

[446] "Crime in California 2014," California Department of Justice, 34, 49.

extraordinary progress would not have been possible without the dynamics of civil–military relations. Civilians used monitoring mechanisms (hearings before congress, media, etc.) to pressure the military to rise to a higher standard in responding to sexual assault.

Though the civil–military relations tension has brought the military to a higher standard, civilians must also be mindful of military culture and how it is reflected in the military justice system. Military culture is part of the reason that progress happened so quickly. The military was held accountable and took to the task of improving sexual assault policy. At this point, taking into account the military dynamic is important. For example, Senator Gillibrand has introduced a proposal that gives military prosecutors the authority to take a case to court martial or not.[447] Yet, based on California's prosecution rate (which remains foggy at best), I am not convinced that outside prosecutors would solve the problem of cases going to trial—unless their incentive to win a case changed. Thus, the problem is not resolved, but merely changed.

After looking at both systems, and where they stand today, the civil–military relations tension of who controls what may create a problem for victims. Instead of looking at the problem of sexual assault in both justice systems and seeking to find a good system and policy, the approach to sexual assault becomes about pointing fingers at who is doing a worse job. The issue becomes about civilian control, military obedience, and military culture instead of about the larger societal sexual assault problem. In approaching sexual assault, civilians and the military must ask, "What can we learn from each system?" vice "Who is in control?" In the following pages, I will use this approach to shed light on what the military can learn from the civilian justice system and vice versa. Two excellent systems are better for victims than two competing flawed systems.

1. Lessons from the Military Justice System

One of the most important takeaways from the military justice system is the progress that occurred when Congress held it accountable**.** Today we see everything the military does to prevent sexual assault and what it does to respond when sexual assault

[447] Steinhauer, "Joint Chiefs' Answers."

occurs. SAPRO produces a detailed annual report that states how many reports of rape occurred, how many suspects were identified as a result of those reports, how many cases went to trial, what happened if they did not go to trial, and the results of the trials. These reports are very thorough and provide transparency of the system. I did not see these kinds of reports on the civilian side. If the civilian justice system does not provide this level of transparency, how are the citizens of America to hold their justice systems accountable? Military provides all of its information, which makes it very easy to criticize; yet, the civilian justice system does not share the same information. Ideally, state Attorney Generals should be producing annual reports on how many reports of rape there are, how many of those reports result in arrest, go to trial, and the results of the trial (Plea bargain? Confinement? If put in confinement, for how long?); this information should be used to analyze what is working, and what is not working, in the civilian justice system. State annual reports on sexual assault should be readily available to the people of the state. The military justice system is continually reviewing and improving its approach to sexual assault; the civilian world is not doing the same and certainly is not under the same pressure as the military to improve.

Another take away from the military system is the damage that bias can do to a victim of sexual assault, there were many criticisms of commanders protecting the perpetrators because of bias ("good soldier," good order and discipline, etc.). On the civilian side, we see similar bias with DAs choosing not to take a case to trial because of rape myths affecting the likelihood of a conviction. The problem, highlighted in the military system by the blatant conflict of interest of commanders, is incentive. The civilian justice system must consider where incentive lies for prosecutors and district attorneys. If civilians do not address this issue, cases, which might otherwise go to trial, will continue to be screened for convictability and victims will continue to see their perpetrators walk.

2. Lessons from the Civilian Justice System

Commanders have an obvious conflict of interest. Commanders know the people involved in the case—often these people are enmeshed in every aspect of the commander's life. Military culture transcends work life. Aside from knowing the people

in their chain of command, commanders are responsible for their command's good order and discipline. The civilian justice system uses independent prosecutors to evaluate cases for trial. Though the DAs are swayed by the incentive to convict, commanders have an even stronger incentive because of their familiarity with the people involved and their desire to display good leadership. Commanders do not have incentive to draw attention to the fact that a sexual assault occurred on their watch. Additionally, if they know the perpetrator, and if the perpetrator is well regarded, the incentive is to make the situation go away.

The difference between civilian culture and military culture also provides a lesson to the military justice system. Military culture is not an alibi in this sexual assault problem—it must be factored into how the military approaches sexual assault. Civilian victims will not experience the same level of retaliation that the military victim will experience. Though we do see some examples in the civilian world; for example, in the Kobe Bryant rape case, many media outlets, and even the attorney of Kobe Bryant, shamed the victim.[448] The military is already taking steps to address how to approach sexual assault problems, such as retaliation.

3. Lessons from Both Systems

Culture around sexual assault in the civilian justice system is disconcerting; the societal definition of a victim is fluctuant, and people still have a hard time breaking from rape myth biases involving issues such as consent. These civilian cultural issues around sexual assault are intensified in the hyper-masculine environment of the military. Education, information, and policy on both sides must be improved so that the people of the military and the people of the state of California are informed about the realities of sexual assault in their respective communities. Policy on both sides needs to be implemented to protect victims from cultural bias, to keep the people informed, and to provide more resources to victims.

[448] Aviva Orenstein, "Special Issues Raised by Rape Trial," *Fordham Law Review* 76, no 3, (2007):, 1590, http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4333&context=flr.

C. CONCLUSION

If the civilian and military world work together to capitalize on learning from each other, and to strengthen the different weak areas in both systems, real progress can occur in serving victims of sexual assault in both systems. If civil–military relations tension over control takes the lead, the military is likely to bypass the civilian justice system in serving victims of sexual assault merely because they are under pressure to improve from the civilians. The need for civilian control could also easily result in civilians pressuring the military to implement ineffective policies of the civilian justice system without taking into account their own flaws, or how those policies might be implemented in the military environment. The power struggle in civil–military relations must be addressed in policy decisions so that the focus moves to the victims instead of a civil–military control struggle.

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